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The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion

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THE CHANGING FACES OF FIRST AMENDMENT NEUTRALITY: R.A.V. v ST. PAUL, RUST v SULLIVAN, AND THE PROBLEM OF CONTENT-BASED UNDERINCLUSION

Consider two cases—the most debated, as well as the most important, First Amendment cases decided by the Supreme Court in the past two Terms: *R.A.V. v St. Paul*,[1] invalidating a so-called hate speech ordinance, and *Rust v Sullivan*,[2] upholding the so-called abortion gag rule. On their face, the cases have little in common; certainly, the Justices deciding them saw no connection. Yet just underneath the surface, the cases have a similar structure, implicate an identical question, and fall within a single (though generally unrecognized) category of First Amendment cases. Along with many other cases to which neither has been assimilated, *R.A.V.* and *Rust* are, on this level, essentially the same—except that the one issue of First Amendment law they posed was answered by the Court in two different ways.

The equation of the cases at first glance is jarring, because an

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[1] 112 S Ct 2538 (1992).

[2] 111 S Ct 1759 (1991).

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orthodox understanding of First Amendment law highlights only the cases' dissimilarities. On such a view, the Court in *Rust* faced the new—and exceedingly difficult—First Amendment problem of selective funding of speech by the government.[3] The question was whether the federal government could fund a range of family planning services, but exclude from such funding abortion counseling, advocacy, or referral. Call this a selective subsidization question or call it an unconstitutional conditions question,[4] the essential nature of the inquiry is the same: it focuses on the government's ability to influence the realm of speech by distributing its own (wholly optional) largesse. By contrast, according to the orthodox view, the Court in *R.A.V.* faced the classic—and largely settled—First Amendment problem of the outright prohibition of a certain kind of speech by the government. The question was whether a municipality could criminalize the use of "fighting words" that provoke violence "on the basis of race, color, creed, religion, or gender." The focus was on the ability of the government to ban speech on the basis of content through use of the government's coercive power. Seen in this light, *Rust* and *R.A.V.* raised different problems, and it is no wonder that the cases provoked divergent responses: a stark rejection of the First Amendment claim in *Rust*, a powerful affirmation of the First Amendment claim in *R.A.V.*[5]

[3] To call such questions "new" is in a significant sense to compress history. The potential for these questions to emerge has existed in great measure since the rise of the regulatory state, and the Court has decided a number of First Amendment cases involving selective subsidization issues during the past decades. See, for example, *Speiser v Randall*, 357 US 513 (1958). Indeed, even prior to the creation of the regulatory state, issues of this kind could arise in such contexts as government property or employment. See, for example, *McAuliffe v Mayor of New Bedford*, 155 Mass 216, 29 NE 517 (1892). That these issues are still considered in any degree novel may have as much to do with their intractability—with the continuing inability of courts and commentators to resolve them—as with their timing.

[4] Phrased in the language of conditions, the question is whether the government could condition its grant of funding on the content of the recipient's speech.

[5] The variance—and, I will soon argue, the inconsistency—in the Court's responses to *Rust* and *R.A.V.* goes yet further than that suggested in the text. Four of the five Justices who voted to deny the First Amendment claim in *Rust* voted to sustain a broad First Amendment position in *R.A.V.* Those four were Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter; of the *Rust* majority, only Justice White rejected the broad First Amendment argument in *R.A.V.*, though concurring in the result on narrower grounds. Conversely, the two active Justices who wished to sustain the First Amendment claim in *Rust* (Justices Blackmun and Stevens) rejected the *R.A.V.* majority's broad First Amendment reasoning, though again concurring in the result. Justice O'Connor, who voted with the concurring Justices in *R.A.V.*, declined to take a position on the constitutional question in *Rust*, and in the interim between the two cases Justice Thomas, who joined the *R.A.V.* majority, replaced Justice Marshall, who joined the *Rust* dissent.

But is this the only—is this the best—way to view these cases? Or can they be recast—the issues in them redescribed—so that an underlying similarity leaps out? A few preliminaries at once suggest themselves. First, both cases involve speech of a particularly controversial—many believe deeply harmful—kind. That abortion advocacy is the bane of a certain segment of the political right and that racist speech is the bane of a certain segment of the political left must be considered, for First Amendment purposes, not a distinction, but a core likeness. Next, in each case the government responded to this controversy by engaging in a form of content discrimination, disfavoring certain substantive messages as compared to others. Both cases thus raise general questions of First Amendment neutrality: whether, when, and how the government may tip the scales for (or against) certain messages—or, stated otherwise, to what extent the government is required, with respect to the content of speech, to play a neutral role. But more than this must be said to assimilate the cases, for surely the question of First Amendment neutrality may present itself in different contexts, and different contexts may demand different approaches and legal rules. The key, then, to understanding the connection between *R.A.V.* and *Rust* is to note that in both cases, the issue of neutrality arises in the same way—that in both, the structure of the problem is the same.

How is this so? Briefly stated for now, *Rust* and *R.A.V.* both raise the question: If, in a certain setting, the government need not protect or promote any speech at all, may the government choose to protect or promote only speech with a certain content? *Rust* is easily seen in this light. The government, we believe, is not constitutionally required to promote speech through the use of federal funds.[6] May the government then fund whatever speech it wants? Or does it face constraints in selectively promoting expression? The question is similar in *R.A.V.* The government is not constitutionally required to tolerate any "fighting words" at all. May the government then permit some but not all fighting words? Or is it constitutionally constrained from selectively doling out this favor? The question posed in each case is in an important sense the question of First Amendment neutrality in its starkest form:

[6] There are exceptions to this widely accepted principle. See note 53. Yet the rule remains generally valid and served as the foundation for *Rust*.

when speech, considered broadly, has no claim to government promotion or protection, what limitations does government face in voluntarily advancing some messages, but not all?

This issue, which I will call the issue of content-based underinclusion, extends far beyond *Rust* and *R.A.V.* themselves. It links a wide variety of First Amendment cases and defines a largely unacknowledged First Amendment category. The question arises in cases involving selective funding of speech (such as *Rust*), selective prohibition of wholly proscribable speech (such as *R.A.V.*), selective bans on speech in non-public forums, and selective imposition of otherwise valid time, place, or manner restrictions (which may or may not involve the use of government property). At present, some of these cases—most notably, those involving funding decisions—are viewed as raising nasty, even intractable issues; others are seen as far more transparent. But if we recognize that all belong to one broad category, we may come to doubt our certainty as to some, even as we may gain guidance on others.

In this article, I view *R.A.V.* and *Rust* as reflecting on each other and, together, as reflecting on a broader range of First Amendment cases. My purpose is to elucidate connections that the Court's discourse has obscured, to explore what turns out to be a far-flung problem, and to essay some steps toward a solution. In Part I, I summarize the opinions in *R.A.V.* and *Rust*, showing how the majority opinion in *R.A.V.* echoes the principal dissent in *Rust* and how the majority opinion in *Rust* anticipates the principal concurrence in *R.A.V.* In Part II, I provide a fuller statement of the structural congruity of the cases and the issue they present, and I connect them with other kinds of First Amendment cases raising the question of content-based underinclusion. Part III considers two objections to this broad linkage: one based on the distinction between penalties and nonsubsidies, the other based on what appears to be the plenary power of the government to engage in speech itself. Finally, Part IV offers some tentative thoughts on the resolution of the problem of content-based underinclusion.

I

R.A.V. arose from the City of St. Paul's decision to charge a juvenile under the St. Paul Bias-Motivated Crime Ordinance for allegedly burning a cross on the property of an African-American family. The ordinance, as written, declared it a misdemeanor for any person to "place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ."[7]

The trial court dismissed the charge on the ground that the St. Paul ordinance was overbroad. The Minnesota Supreme Court reversed, holding that the ordinance, as properly construed, banned only expression not protected by the First Amendment. The court relied on *Chaplinsky v New Hampshire*, which declared that "fighting words"—defined as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—could be punished without "rais[ing] any constitutional problem."[8] According to the Minnesota Supreme Court, the St. Paul ordinance was constitutional because it extended only to expression that fell within the *Chaplinsky* formulation (although, of course, not to all such expression): the law covered "fighting words" that injured or provoked violence on the basis of race, color, creed, religion, or gender.[9]

All nine Justices agreed to strike down the ordinance as construed by the Minnesota Supreme Court, but none pretended to have achieved anything more than surface unanimity. Four of the Justices invalidated the law only because, in their view, the Minnesota Supreme Court had failed in its attempt to limit the ordinance to expression proscribable under *Chaplinsky*; the ordinance thus remained overbroad.[10] The majority declined to consider this argument, and the real controversy in the case lay elsewhere. It centered on the following question: Assuming the St. Paul ordinance

[7] Minn Stat § 292.02 (1990).

[8] 315 US 568, 572 (1942).

[9] See *In re Welfare of R.A.V.*, 464 NW2d 507, 510–11 (1991).

[10] In holding that the St. Paul ordinance reached only "fighting words" as defined by *Chaplinsky*, the Minnesota Supreme Court had suggested that the *Chaplinsky* definition included expression that by its very utterance caused (in the words of the St. Paul ordinance) "anger, alarm or resentment." 112 S Ct at 2559. The four concurring Justices objected to this sweeping understanding of *Chaplinsky*. The Justices stated, in accord with other post-*Chaplinsky* decisions, that the fighting words doctrine articulated in that case in no way allowed the restriction of speech that inflicted only such "injury" as "hurt feelings, offense, or resentment." Id.

reached only expression proscribable under *Chaplinsky*, did the ordinance remain invalid because it reached some, but not all, of this expression—because it banned, on the basis of content, only certain fighting words?

Justice Scalia, writing for the majority,[11] answered the question in the affirmative and invalidated the ordinance on this ground. In prior cases, Justice Scalia readily admitted, the Court had made a judgment that fighting words could be banned entirely—a judgment based on the view that such words are "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[12] The Court even had gone so far as to say that fighting words and other similar categories of expression are "'not within the area of constitutionally protected speech'" and that the "'protection of the First Amendment does not extend'" to them.[13] But were these statements to be taken as "literally true"?[14] Did the First Amendment vanish from the landscape because the government had no obligation to permit the utterance of fighting words? Not at all.

What remained fixed on the constitutional terrain was an obligation of content-neutrality, perhaps slightly relaxed in the context of proscribable speech, but still with significant bite. No matter, for example, that the government may proscribe libel; "it may not make the further content discrimination of proscribing *only* libel critical of the government."[15] No matter that a city may ban obscenity; it may not "prohibit . . . only that obscenity which includes offensive political messages."[16] Similarly, with respect to the case at hand: no matter that a city may bar all fighting words; it may not (as, the majority held, St. Paul did) bar only those fighting words addressing a particular subject or expressing a particular viewpoint.[17] Although the category of fighting words is "unprotected"—although it has, "in and of itself, [no] claim upon the First Amendment"—the government does not have free rein to regulate selectively within the category.[18] Even wholly proscribable categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination."[19] To sustain all content discrimination within categories of speech, simply because the categories as a whole are proscribable, would be to engage in "a simplistic, all-or-nothing-at-all approach to First Amendment protection . . . at odds with common sense."[20]

Justice White, in a concurring opinion,[21] took direct issue with this reasoning: for him, the only relevant fact was that fighting words as a category could be banned under the First Amendment. Once the determination had been made that fighting words generally had no claim to First Amendment protection, the conclusion followed that the government could regulate such expression freely—even if that regulation took the form of content discrimination. "It is inconsistent to hold that the government may proscribe an entire category of speech . . . but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition . . . undeserving of constitutional protection."[22] Indeed, such a holding foolishly would force the government to choose between regulating all proscribable speech or none at all.[23] In Justice White's frame-

[11] The majority also included Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas.

[12] 112 S Ct at 2543 (quoting *Chaplinsky*, 315 US at 572). Justice Scalia's opinion nowhere questioned the fighting words doctrine as formulated in *Chaplinsky*; that doctrine was treated throughout the opinion as a given. It is conceivable that some unstated discomfort with the fighting words doctrine contributed to, or even caused, the *R.A.V.* decision; on this view, the reasoning of the Court in *R.A.V.* operated as a kind of second-best surrogate for the ideal but seemingly intemperate course of overruling the doctrine entirely. Cf. Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv L Rev 4, 28–31 (1988) (explaining various prohibitions on selective government action found in unconstitutional conditions cases as a second-best means of constraining unwisely granted government power). I assume here that the *R.A.V.* Court meant what it said and that its rationale was something more than a pretext for limiting a doctrine it did not like, but felt bound to tolerate.

[13] Id at 2543 (quoting, inter alia, *Roth v United States*, 354 US 476, 483 (1957), and *Base Corp. v Consumers Union*, 466 US 485, 504 (1984)).

[14] Id.

[15] Id (emphasis in original).

[16] Id at 2546 (emphasis deleted).

[17] Id at 2547.

[18] Id at 2545.

[19] Id at 2543.

[20] Id.

[21] Justice White's opinion was joined in full by Justice Blackmun and Justice O'Connor. Justice Stevens joined only the portion of the opinion stating that the ordinance was overbroad; he specifically rejected both Justice White's and Justice Scalia's approaches to the question discussed in the text. I discuss aspects of Justice Stevens's opinion in Part IV.

[22] Id at 2553.

[23] In this manner, Justice White was able to throw back upon Justice Scalia the charge of all-or-nothingism. See id. Justice Stevens charged both opinions with manifesting that apparently discredited approach to First Amendment questions. See id at 2562, 2567.

work, when speech had no claim to constitutional protection, government selectivity made no First Amendment difference;[24] if the government had no obligation to permit fighting words at all, then it faced no constraints in permitting some fighting words but not others.

Turn now to *Rust*, and compare the structure of the argument. The Department of Health and Human Services had issued regulations governing the allocation and use of Title X grants.[25] These regulations prohibited Title X–funded projects from providing abortion counseling or referrals (instead requiring them to provide referrals for prenatal care), as well as from encouraging, promoting, or advocating abortion. Title X grantees challenged the regulations, alleging (among other claims) that they violated the First Amendment.[26] The grantees argued in part that, by virtue of the regulations, the availability of subsidies now hinged on the content of speech—or, more specifically, its viewpoint: the government would subsidize a wide range of speech on family planning and other topics (including anti-abortion speech), but not abortion counseling, referral, or advocacy.

A majority of the Court, speaking through Chief Justice Rehnquist, rejected this argument. The starting point, for the Court, was that the Constitution required no subsidization of speech at all: "'[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'"[27] For the majority it followed that the government could also subsidize speech selectively within broad limits:[28] the Court had rejected the proposition "that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights."[29] In effect, the "general rule that the Government may choose not to subsidize speech" implied a corollary: the government may choose which speech to fund.[30] And what of the usual First Amendment proscription against viewpoint discrimination? The Chief Justice suggested that in this context the term had no application: when the government "has merely chosen to fund one [speech] activity to the exclusion of the other[,]" the government "has not discriminated on the basis of viewpoint."[31] In allotting funds, the government was entitled to make "value judgment[s]."[32] The government could subsidize speech promoting democracy, but not speech promoting fascism;[33] the government could subsidize speech of family planning clinics (including anti-abortion speech) except for abortion advocacy and referral. All followed from a simple point: "Title X subsidies are just that, subsidies."[34] The statement echoes Justice White in *R.A.V.*: Fighting words are just that, fighting words. When the government has no general obligation, it has no obligation of neutrality.

Justice Blackmun's dissent in *Rust* vigorously disputed this proposition. Justice Blackmun acknowledged that the government generally has a choice whether to fund the exercise of a constitutional right, but he insisted that "there are some bases upon which gov-

[24] Justice White stated that the Equal Protection Clause, as distinct from the First Amendment, would pose a barrier to differential treatment not rationally related to a legitimate government interest. See id at 2555. Akhil Amar suggests that in acknowledging the relevance of the Equal Protection Clause, Justice White may have conceded the crucial point: that even within the realm of unprotected speech, some state action is illegitimate. See Akhil R. Amar, *Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv L Rev 124, 130 & n 46. The question remains, though: Exactly what state action is illegitimate? Justice White's rational basis test, which would strike down legislation "based on senseless distinctions," 112 S Ct at 2556 n 9, will not lead to the same results as Justice Scalia's demanding First Amendment scrutiny.

[25] Such grants are made under Title X of the Public Health Service Act, 42 USC §§ 300–300a-6 (1988), which provides monies for family planning services. The HHS regulations appear at 42 CFR §§ 59.7–59.10 (1991).

[26] The grantees also argued that the regulations failed to comport with the governing statute and that they violated the Fifth Amendment right of women to choose to have an abortion. The Court rejected both these claims.

[27] 111 S Ct at 1772 (quoting *Regan v Taxation with Representation*, 461 US 540, 549 (1983)).

[28] Noting that funding by the government might not "invariably [be] sufficient to justify government control over the content of expression," the Court proposed two potential exceptions: when the subsidy was offered to a university or when the subsidy took the form of providing a public forum. Id at 1776.

[29] Id at 1773.

[30] Id at 1776.

[31] It is conceivable that the Chief Justice intended to make a far narrower point than that suggested in the text: he may have meant only that the particular funding decision at issue did not involve viewpoint discrimination (as generally understood in First Amendment law), because the HHS regulations merely drew a distinction, on the basis of subject matter, between speech concerning preconception family planning and all other speech. In one portion of the opinion, the Court indeed approaches this argument. See id at 1772. But the argument, aside from being fallacious in light of the language of the regulations, see text at note 99, cannot be thought to represent the whole, or even a major part, of the Court's reasoning: so narrow an interpretation of the decision makes most of the *Rust* opinion, including the statements emphasized in the text, incomprehensible.

[32] Id at 1772.

[33] Id at 1773.

[34] Id at 1775 n 5.

ernment may not rest [a] decision" to fund expression.[35] Selective funding becomes impermissible when based upon the content—most clearly, upon the viewpoint—of the expression. The government may not "'discriminate invidiously in its subsidies'" of speech by basing them on ideological viewpoint.[36] Thus, Justice Blackmun concluded, "[t]he majority's reliance on the fact that the Regulations pertain solely to funding decisions simply begs the question."[37] The point echoes Justice Scalia in *R.A.V.*: The concurrence's reliance on the fact that the St. Paul ordinance pertains solely to fighting words simply begs the question. Even in this circumstance, the government retains an obligation of neutrality.

Thus do the arguments in *Rust* and *R.A.V.* mirror each other. Between the two cases, the Court switched sides: the dissent in *Rust* became the *R.A.V.* majority, the majority in *Rust* became a concurrence in *R.A.V.* So too did most of the individual Justices trade positions; the difference in the outcome of the cases is hardly due to the change of mind of a single Justice.[38] But the structure of the dispute in the two cases is almost precisely the same. And that is because the *Rust* Court and the *R.A.V.* Court faced the same issue—a distinctive kind of First Amendment neutrality issue, extending far beyond *R.A.V.* and *Rust* themselves, which might best be labeled content-based underinclusion.

II

What, precisely, is content-based underinclusion? Suppose that the government, consistent with the First Amendment, may limit—by prohibiting or by refusing to subsidize—either an entire category of speech or all speech within a particular context. Now suppose that the government declines to go so far: rather than limiting speech to the full extent of its constitutional power, the government chooses to limit only some expression—and that on the basis of content. The resulting government action is, in the ordinary sense, narrower than the action stipulated to be constitutional. That is, the merely partial limitation allows more expression. Yet this "narrower" action incorporates a content-based distinction: it picks and chooses among expression on the basis of what is said. The question thus becomes whether and when a government that has the power to restrict speech generally may instead limit select kinds of expression. Or, looked at from a different angle, the question is whether the government may voluntarily promote or protect some (but not all) speech on the basis of content, when none of the speech, considered in and of itself, has a constitutional claim to promotion or protection.

Such underinclusion—government may ban all speech in a category, but instead bans only some, defined by content—is a particular kind of content-based restriction, by no means equivalent to all government actions falling within the broad content-based category.[39] In many—indeed, most—cases of content-based speech restrictions, the question of inequality between different kinds of expression is wrapped in, and in practice inseparable from, a theoretically distinct issue: the permissibility of the burden placed on the speech affected. Consider, for example, a case arising from a statute that criminalizes in all contexts constitutionally protected speech—say, seditious advocacy. In deciding such a case, the Court usually will not ask whether the government has a sufficient reason to treat speech of one kind (seditious advocacy) differently from speech of another; rather, the Court will ask merely whether the government has a sufficient reason to restrict the speech actually affected.[40] The framing of the inquiry relates to the nature of the problem: in such a case, the issue is not underinclusion, for the government could not cure the constitutional flaw by extending the restriction to all speech regardless of its content.

By contrast, in a content-based underinclusion case, equality is

[35] Id at 1781.

[36] Id at 1780 (quoting *Regan*, 461 US at 548); see id at 1782.

[37] Id at 1781.

[38] See note 5.

[39] Justice Scalia attempts in *R.A.V.* to avoid the term "underinclusiveness" in favor of the broader term "content discrimination," apparently because he thinks the former term more liable to the concurring opinions' charges of First Amendment absolutism. See 112 S Ct at 2545. But content-based underinclusion is no more than a distinctive kind of content-based distinction, and analysis explicitly focusing on underinclusion (when it exists) does no more than respond to the peculiar nature of the governmental action and the peculiar concerns it raises. Justice Scalia himself recognizes the need to distinguish among different kinds of content-based distinctions when he concedes that content-based analysis may take a somewhat different form in the context of wholly proscribable speech than in other First Amendment contexts. See id.

[40] See, e.g., *Brandenburg v Ohio*, 395 US 444 (1969) (per curiam); see generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 202–3 (1983).

all that is at issue. Here, the Court usually will state the issue in terms of (and only in terms of) equal treatment. The Court will ask not whether the government has a sufficient reason for restricting the speech affected (taken in isolation), but whether the government has a sufficient reason for restricting the speech affected *and* not restricting other expression.[41] Once again, the framing of the inquiry follows from the structure of the problem. In these cases, by definition, the restriction is permissible but for the inequality, and the constitutional infirmity thus may be erased by extending the restriction to additional speech as well as by eliminating it entirely.[42] The First Amendment functions in these cases solely as a guarantee of some kind of equality on the plane of content.

The issue of content-based underinclusion arises in many settings—all superficially unlike, but all essentially similar.[43] One set of cases presenting the issue involves the selective imposition of otherwise reasonable time, place, or manner restrictions. Assume that a city may ban the use of noisy soundtrucks between sunset and sunrise in residential districts. Now assume that the city, rather than enacting this flat ban, exempts the use of soundtrucks to laud city government. One approach to this law holds that the burden imposed on speech is itself constitutionally permissible, but strikes down the law because of the content-based exemption.[44]

[41] On occasion the Court has focused on differential treatment without stating that a generally applied restriction of the same kind would be constitutional. But in almost all of the cases in which the Court has framed the question in this manner, such a general restriction on speech at least arguably would have satisfied constitutional standards. See, for example, *Police Dep't v Mosley*, 408 US 92 (1972).

[42] Justices frequently object to the Court's analysis in such cases precisely on the ground that it permits the enactment of a broader speech restriction. See 112 S Ct at 2553 (White concurring); id at 2561–62 (Stevens concurring); *Metromedia, Inc. v San Diego*, 453 US 490, 564 (1981) (Burger dissenting); *Carey v Brown*, 447 US 455, 475 (1980) (Rehnquist dissenting).

[43] See Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* at 1337–62 (Little, Brown, 2d ed 1991), which organizes some cases along the lines I suggest in a section entitled "Equality and Free Expression."

[44] A court also might take either of two different approaches to the law. First, a court might ask whether the government has a compelling reason to burden the speech affected, without any exploration of the scope of the exemption. Under this approach, the content-based exemption serves to heighten the standard of review (to one of compelling interest); the ultimate inquiry, however, remains focused on the permissibility of the burden imposed, irrespective of the exemption. Second, a court might again focus on the permissibility of the burden imposed, but use the exemption not merely to heighten the standard of review, but to discredit the justification for the general speech restriction. For example, in the hypothetical given, a court might reason that if the city allows this exemption, then the city must view the interest in quiet during evening hours as insignificant, in which case the general restriction must fall. An analysis of this kind, although relying heavily on the exemption, in the end tests the constitutionality of the actual burden imposed on speech and finds that burden excessive. In other words, the exemption itself is not what is invalid; rather, the exemption proves the invalidity of a more general ban. See Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 202–7 (cited in note 40).

Under this analysis, the permissibility of the general restriction is irrelevant: the government, even when it has discretion over allowing speech at all, may not grace a certain kind of speech with its special favor.[45]

Many Supreme Court cases reviewing limited time, place, or manner regulations incorporate this understanding of the content-based underinclusion problem and the analysis associated with it. In some of these cases, the regulations applied to the use of public forums. For example, in *Police Dept. v Mosley*,[46] the Court reviewed an ordinance that prohibited picketing on public streets near a school during certain hours, but exempted labor picketing from the general restriction. The Court held the ordinance unconstitutional because of the distinction between labor picketing and other picketing—because the ordinance worked a content-based "selective exclusion from a public place."[47] In other cases, the time, place, or manner restriction has applied outside the realm of public property. Thus, in *Metromedia v San Diego*,[48] the Court considered the

[45] The Court in *R.A.V.* itself recognized the link between *R.A.V.* and cases of the kind discussed in the text. The Court compared the proscription of fighting words to the proscription of a noisy soundtruck. See 112 S Ct at 2544–45. The analogy implies that content-based distinctions within a generally proscribable category of speech (such as fighting words) present the same question as content-based distinctions superimposed on an otherwise valid time, place, or manner regulation.

[46] 408 US 92 (1972).

[47] Id at 94; see also *Carey v Brown*, 447 US 455 (1980) (invalidating on the same ground a statute prohibiting all picketing, except labor picketing, on streets surrounding residential places). *City of Lakewood v Plain Dealer Publishing Co.*, 108 S Ct 2138 (1988), presented the same issue in a different form. The case involved standards governing the allocation of city permits for newspaper vending machines. All assumed that the provision of city property (even public forum property) for vending machines was wholly optional, in the sense that the city government could choose whether it wished to allow any machines at all. The majority held that if the city chose to exercise this power, it must do so under standards that would safeguard against content discrimination. The dissent, written by Justice White and closely resembling his opinion in *R.A.V.*, concluded that because the First Amendment did not obligate the city to allow the placement of newsracks on city streets (or, in his words, because the placement of newsracks—like the use of fighting words—was not "protected by the First Amendment"), the city had no obligation to promulgate protective standards. In *Lakewood*, however, even Justice White agreed that were the city actually to engage in content discrimination in allocating newsrack permits, the First Amendment would come into play.

[48] 453 US 490 (1981).

legality of an ordinance restricting the use of billboards unless they fell within certain categories defined by content, such as political campaign signs or signs indicating the temperature or time. Here too, the Court struck down the law on the basis of its selectivity, entirely independent of the extent of the burden that the law imposed on the covered speech. The message in these cases, regardless whether public property was involved, was the same: even if speech generally may be regulated through reasonable time, place, or manner restrictions, such restrictions may not be imposed on speech only of a certain content.

All of these cases thus concern the same issue as *Rust* and *R.A.V.*, although they reach results identical only to the latter. In *Rust*, the Court permitted the government to favor (through funding) certain kinds of speech, on the ground that the government need not have favored any. In *Mosley* and *Metromedia*, the Court refused to allow the government to engage in similar selectivity: to favor (through donating public property or granting a regulatory exemption) certain kinds of speech on the ground that all speech could have been disfavored. If anything, as I will later discuss, *Rust* might be thought to raise a graver First Amendment problem, because the selectivity there was based on viewpoint, whereas in *Mosley* and *Metromedia*, it was based (at least facially) only on subject matter. In any event, the cases raised the same essential issue: the demands of First Amendment neutrality in a sphere in which government action respecting speech is in the first instance optional.

The Court often confronts the identical issue—but handles it differently—when dealing with speech restrictions applicable to non-public forums. Within broad limits, the government may choose to impose in such places sweeping restrictions on speech, so long as generally applicable.[49] Depending on the nature of the non-public forum, the government may have discretion to ban speech entirely. Frequently, however, the government chooses to restrict—in this context, up to the point of banning altogether—

[49] Restrictions must be "reasonable" in light of the nature and purposes of the non-public forum, but this standard frequently allows even wholesale prohibition of speech. For an example of the ease with which the reasonableness standard may be met in the context of non-public forums, see *International Society for Krishna Consciousness, Inc. v Lee*, 112 S Ct 2701 (1992). By contrast, in a public forum (whether traditional or designated), the government has only very narrow discretion to curtail speech generally, through limited time, place, or manner restrictions.

only speech of a certain content. Thus, the question once more arises: in circumstances in which the government need not allow or foster any speech, may it decide to allow or foster some speech on the basis of content?

Two cases will serve to illustrate how the issue arises—and how the Court has handled it—in this context. In *Lehman v City of Shaker Heights*,[50] the Court reviewed a municipal policy of refusing to sell advertising space on city buses to persons who wished to use the space to engage in political speech. After finding that the advertising space did not constitute a public forum, and thus that no general right of access applied, the Court was left with the question whether the municipality could bar only a certain kind of speech. Similarly, in *Greer v Spock*,[51] the Court considered whether a military base, also a non-public forum, could bar speeches and demonstrations of a partisan political nature, while allowing other kinds of expression. In these cases and others,[52] the Court has permitted some content-based distinctions (including those based on subject matter), but has drawn the line at distinctions that are based on viewpoint. The government may not use its broad discretion over the property it owns to advantage some viewpoints at the expense of others, but as in *Lehman* and *Greer* may make other distinctions based on content.

These cases too resemble *Rust* and *R.A.V.*, except in the rules the Court has established and the results it has reached. Banning all fighting words, as in *R.A.V.*, is no more problematic than banning all speech in a non-public forum. Yet in *R.A.V.*, the Court invalidated selective proscription, suggesting that even subject-matter distinctions violated the First Amendment, whereas in *Lehman* and *Greer*, the Court upheld such selective proscription. Perhaps, as I shall later discuss, the cases may be distinguished by virtue of the kind of content discrimination in each. But surely it should make no difference that the one case involves a selective ban within a wholly proscribable category of speech, the others a selective ban within a non-public forum. In both, what is at issue is the ability of the government to restrict some (but not all) speech

[50] 418 US 298 (1974).

[51] 424 US 828 (1976).

[52] See *Perry v Perry*, 460 US 37 (1983) (upholding statute granting preferential access to an interschool mail system); *Cornelius v NAACP*, 473 US 788 (1985) (upholding government policy limiting access to a charity drive aimed at federal employees).

when the government has the discretion to restrict the speech entirely.

From the discussion so far, it may come as little surprise to discover that even within a single setting—that of selective funding decisions—the problem of content-based underinclusion has bedeviled the Court. The government, as a general rule, need not fund any speech, whether through direct expenditures, tax exemptions, or other mechanisms.[53] But what if the government chooses to fund some (but not all) speech on the basis of content? Prior to *Rust*, the Court had confronted on several occasions this issue of selectivity in public funding decisions. In *Arkansas Writers' Project v Ragland*, for example, the Court considered the constitutionality of extending a tax exemption to religious, professional, trade, and sports journals, but not to general-interest magazines.[54] The Court struck down the exemption scheme because it rested on content distinctions, even though turning only on subject matter. In *Regan v Taxation with Representation*, by contrast, the Court approved a congressional decision to grant a tax subsidy to veterans' organizations, but not to other organizations, engaged in lobbying efforts.[55] There, the Court indicated (as it has in the non-public forum cases) that only viewpoint-based selectivity in government funding would violate the First Amendment.[56] Finally, as discussed

[53] This general rule is burdened with at least one prominent exception. The government has a broad obligation to permit speech in public forums; this donation of property for speech purposes is a form of funding. In addition, the government may have a duty to provide police protection and like services to speakers in certain circumstances. See *Edwards v South Carolina*, 372 US 229, 231–33 (1963); *Cox v Louisiana*, 379 US 536, 550 (1965). Once again, in providing these services, the government effectively funds expression. See generally Owen M. Fiss, *Why the State?*, 100 Harv L Rev 781, 786 (1987); Cass R. Sunstein, *Free Speech Now*, 59 U Chi L Rev 255, 273–74 (1992).

[54] 481 US 221 (1987).

[55] 461 US 540 (1983).

[56] The debate in *Rugland* and *Regan*, as in most such cases, focused explicitly on the question whether the government's power to refuse all funding implied a power to fund selectively. In dissent in *Ragland*, Justice Scalia saw as dispositive "the general rule that 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' " 481 US at 236 (quoting *Regan*, 461 US at 549). In *Regan*, the majority expounded this reasoning, citing the discretion of Congress over "this sort of largesse" and the absence of any First Amendment right to subsidization of speech. 461 US at 549. Other cases presenting substantially the same issue, in the context of government provision of services, are *Board of Education v Pico*, 457 US 853 (1982), in which the Court disapproved the removal of specified books from a school library over the objection that the government had no constitutional obligation to make available any book in a library, and *Southeastern Promotions v Conrad*, 420 US 546 (1975), in which the Court disapproved the exclusion of the musical "Hair" from a city auditorium over the objection that the city had substantial discretion to determine the nature of the entertainment it wished to support.

previously, the Court in *Rust* suggested that in the funding context even the prohibition on viewpoint discrimination does not apply: the discretionary nature of funding decisions obviates any requirement of government neutrality among different kinds of expression.

What appears to emerge from the cases I have discussed—*Rust*, *R.A.V.*, and all the rest—is a set of diverse and contradictory responses to a single (and ubiquitous) First Amendment problem. All these cases, I have argued, pose the issue of content-based underinclusion, and yet the Court has failed to recognize this essential sameness. The argument, however, is so far only half complete. For although I have stated what bonds the cases, I have not yet explored what might be thought to unglue them. Perhaps there are real differences among these cases—distinctions that reseparate in a principled manner what I have grouped together.

III

In this Part, I consider two objections to the proposition that *Rust* and *R.A.V.* belong to a single category of cases in which the government engages in content-based underinclusion. The first objection turns on the distinction between penalties and nonsubsidies, familiar from the Court's treatment of unconstitutional conditions cases. Cases such as *Rust*, it is said, involve nonsubsidies, whereas cases such as *R.A.V.* involve penalties; and selectivity with respect to nonsubsidies, but not penalties, is permissible. But the distinction between nonsubsidies and penalties founders in cases involving content-based underinclusion; perhaps more important, even if the distinction could be drawn, it would have no significance within this set of cases.

The second objection to viewing these cases as part of a single category relies on the government's plenary power to engage in speech itself. If the government has power to speak unrestrictedly, the argument runs, so too does the government have uncurtailed power to hire "agents" to engage in speech activities: thus does the government action in a case like *Rust*, but not in a case like *R.A.V.*, receive constitutional approval. But this approach also overlooks the distinctive character of content-based underinclusion cases, here by misunderstanding the way in which government action in these cases relates to the government's own expression. Both approaches fail to distinguish *Rust* and *R.A.V.*; both fail to fracture

the category of content-based underinclusion; both fail to answer the question of First Amendment neutrality that category poses.

A

At the base of *Rust* lies the view that nonsubsidies and penalties are different—different in the sense that they can be distinguished from each other, and different also in the sense that the distinction matters. The government may not "penalize" a person for engaging in abortion advocacy, but the government may refuse to "subsidize" such speech, even if it subsidizes other, competing expression. The distinction between nonsubsidies and penalties runs across the gamut of unconstitutional conditions cases, whether or not involving the First Amendment; in these cases, the most common approach is to label governmental actions as either a penalty or a nonsubsidy, to declare the former coercive and unconstitutional, to declare the latter noncoercive and constitutionally permitted.[57]

This distinction prompts an obvious response to the argument I have been making. In discussing *Rust*, *R.A.V.*, and other cases, I have formulated the issue at stake in something like the following way: When may the government permit or subsidize some (but not all) speech on the basis of content in circumstances in which it need not permit or subsidize any? A skeptic might claim that the disjunctives in this statement are doing all the work—in other words, that I am conflating, through these simple "or"s, two separate inquiries. One question (raised, for example, by *Rust*) involves selective subsidies; the other (raised, for example, by *R.A.V.*) involves selective penalties. In that distinction, the argument further runs, lies a critical difference.

A first response to this argument contests the ease—or even the coherence—of an effort to sort out penalties from nonsubsidies in any content-based underinclusion case. In funding cases such as *Rust*, government action that seems to be a mere nonsubisdy becomes a penalty if viewed from a different, and no more contestable, perspective. Less obviously, the same is true (in reverse) of non-funding cases involving underinclusion, such as *R.A.V.*: government action that seems, intuitively, a penalty becomes a mere nonsubsidy with a similar change in perspective.

[57] See, for example, *Regan*, 461 US 540; *Harris v McRae*, 448 US 297 (1980); *Speiser v Randall*, 357 US 513 (1958).

Consider first a selective funding case like *Rust*, in which the difficulty of drawing the penalty/nonsubsidy distinction has frequently been noted.[58] In refusing to provide grants for abortion referrals, is the government penalizing or merely declining to subsidize this exercise of First Amendment rights? The answer rests upon the choice of a position—to use the inevitable jargon, a baseline—from which to measure the action. If the starting point assumes an absence of funding for any family planning services, including abortion referral, then the government action at issue is a nonsubsidy. If, by contrast, the starting point assumes funding for all family planning services, including abortion referral, then the government decision is a penalty.

The difficulty in such cases arises from the task of determining which position to adopt given that the action occurs within a realm of (frequently exercised) government prerogative. Presumably, the government action at issue should be viewed from the position of whatever state of affairs—funding or non-funding—is in some sense normal or natural. But in a world in which the government may and frequently does fund private speech and other activity, but has no general constitutional obligation to do so, the choice of this position is by no means obvious. What is the normal or natural state of affairs in such a world? Stated otherwise, what is a citizen (here, a family planning provider) entitled to expect? Nothing? Something? If the latter, what? The answers frequently are elusive.

Perhaps less obviously, the same difficulties attend any attempt to categorize the governmental action at issue (as penalty or nonsubsidy) in a case like *R.A.V.* A direct prohibition of speech, backed by sanctions, might seem the archetypal penalty. But the question in an underinclusion case, such as *R.A.V.*, is in fact more complicated. Remember that the government, acting within the Constitution, either may permit or may ban fighting words; the First Amendment has nothing to say respecting that decision. If that is so, we may measure the government action at issue from either of two perspectives. We may assume a perspective in which

[58] See, for example, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U Pa L Rev 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 BU L Rev 593 (1990).

the government tolerates all fighting words; in that case, the prohibition of racial fighting words indeed smacks of a penalty. But alternatively, we may assume a perspective in which the government prohibits all fighting words; in that case, a ban on racial fighting words seems a mere nonsubsidy (with any exemption from the general prohibition counting as a subsidy).

As in the funding cases, the choice between the two stances—protection of fighting words or no protection of fighting words—is frequently unclear, and for much the same reason. Given a world in which the government may (and frequently does) but need not protect fighting words, either stance may seem justified. In this context too, it is no mean feat to determine the normal or natural state of affairs, or a citizen's entitlement. And thus in this context too, it is no mean feat to characterize the government action at issue as either a penalty or a nonsubsidy.

Consider, for example, two alternative avenues that a municipality might take to achieve the result of the St. Paul ordinance. First, suppose that a city government initially outlawed all fighting words and then, at some later date, repealed the measure except as to racial fighting words. The repealer in this example is as optional as the provision of funds in *Rust*. It follows that the remaining prohibition, no less than the refusal to fund abortion advocacy, can be considered a mere nonsubsidy. Or, second, suppose that a city government enacted a statute prohibiting fighting words generally, but then exempting, as a special act of legislative grace, non-racial fighting words. Here too, an obvious argument can be made that the exemption is a subsidy, all else nothing more than a refusal to subsidize.

This characterization seems more natural in the hypothetical cases than in *R.A.V.* itself, but that in no way undermines the point I am making. The characterization seems more apt because in choosing a stance from which to view government action, we instinctively consider how the world looked prior to the action and whether the action singles out certain speech for favorable or unfavorable treatment.[59] But this is—or, at the very least, should

[59] See Kreimer, 132 U Pa L Rev at 1359–71 (cited in note 58). Kreimer explicitly advocates the use of these factors to classify government action as a penalty or a nonsubsidy and to determine, on the basis of this classification, the action's constitutionality. My own proposed analysis does not depend on these considerations because it views as essentially irrelevant in the underinclusion context the determination whether government action constitutes a penalty or subsidy. See text following note 64.

be—as true in funding cases as in non-funding underinclusion cases such as *R.A.V.* What the hypothetical cases show is that the same debate over the proper characterization of government action may arise in each of these contexts.

Thus far, the discussion suggests two points: first, that cases like *R.A.V.* and *Rust* cannot easily be distinguished on the ground that the one involves a penalty, the other a subsidy; and second, that the distinction fails because, as shown previously, the cases alike emerge from an area of government discretion. Lest it be at all unclear, I emphasize that I am not, either here or elsewhere in this essay, equating funding cases with all cases involving a direct prohibition of speech. Rather, I am equating funding cases with a specific kind of non-funding case—that involving underinclusion. In these cases, as in funding cases, classification of the government action at issue (as penalty or nonsubsidy) is problematic. It is so because these cases, like funding cases, arise against a backdrop of government prerogative: government may, but need not, act with respect to the speech at issue. Were the Constitution to command a certain action, the problem would evaporate. If the First Amendment, say, required the government to protect fighting words, the requirement itself would establish the proper baseline, and any deviation from the protection of fighting words would constitute a penalty. Similarly in the funding cases, if the Constitution required the government to pay for the exercise of speech rights, any refusal to fund speech would penalize the speaker. The difficulty arises when government has no such general obligation—when (assuming no breach of applicable neutrality requirements) it can protect or not protect, fund or not fund as it chooses.

The essential point applies well beyond the particular contexts of *Rust* and *R.A.V.* As we have seen, general government prerogative exists in a number of First Amendment contexts: not only when the government decides whether to fund speech (*Rust*), or to ban speech falling within proscribable categories (*R.A.V.*), but also when the government decides whether to prohibit speech in nonpublic forums, as in *Greer*, or to issue reasonable time, place, or manner regulations, as in *Mosley*. Here too we may ask whether the government, in allowing only non-political speech on an army base, has penalized political speech or subsidized non-political speech. Or whether the government, in permitting only labor speech around a school during certain hours, has granted a subsidy to labor speech or imposed a penalty on all other expression.

In all of these underinclusion cases, we may play out endless arguments about whether government action with respect to some (but not all) speech has subsidized or penalized; we may say that the government has subsidized expressive activities in declining to exercise the full powers allotted to it under the First Amendment, or we may say that the government has penalized expressive activities in exercising only some subset of those powers. What alone is clear is that the subsidy/penalty line, properly understood, fails to separate any one of the contexts involving content-based underinclusion from the others. If one can be classified as a mere subsidy case, so too can they all.

The argument so far, however, seems subject to the objection that it disregards the ordinary meaning of the terms "subsidy" and "penalty." In common parlance, to subsidize speech means to pay for it; the government subsidizes expression when it picks up the costs of such activity, transferring them from a speaker to taxpayers generally. By contrast, to penalize speech means to impose a burden on a speaker—by fine or other means—that extends beyond requiring her to pay for her own expression.[60] From this standpoint, *Rust* involves a subsidy because the government is paying for speech (thus redistributing from taxpayers to speaker), whereas *R.A.V.* involves a penalty because the government is imposing an extra cost on the speaker (thus effectively redistributing in the opposite direction). Therein, it might be said, lies the difference.[61]

A bit of examination, however, reveals otherwise. The reason is simple: There are many ways for the government to pay for speech,

[60] Richard Epstein and Michael McConnell, in slightly different ways, build their conceptions of the whole unconstitutional conditions doctrine on this redistributive conception of the subsidy/penalty distinction (although McConnell also believes that some government actions counting as subsidies under this analysis still may violate the First Amendment). See Epstein (cited in note 12); Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 San Diego L Rev 255 (1989).

[61] Under this approach, some "funding" cases of course will turn out to involve penalties, rather than subsidies. One example is *FCC v League of Women Voters*, 468 US 364 (1984), in which the Court invalidated a statute prohibiting broadcasters who received any federal monies from airing editorials; the effect of the statute was not merely to cut off government funding of editorials (a nonsubsidy under this approach), but to cut off funding of all the broadcaster's activities if it aired editorials (a penalty under this approach because the benefits withheld went beyond the costs of the speech). See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv L Rev 989, 1016–17 (1991). The primary point I will make is different: that "non-funding" underinclusion cases like *R.A.V.* may turn out to involve subsidies under a test focusing on whether government is merely refusing to pay for speech or exacting some additional cost from the speaker.

and all content-based underinclusion cases—regardless whether they involve the writing of a check from tax revenues—involve some mechanism by which the government picks up some of the costs of a speaker's expression.

Consider in this regard the ordinance in *R.A.V.*, which regulated a brand of fighting words. Such expression, by definition, imposes a cost not merely on other individuals (the targets of the fighting words), but on society at large: fighting words "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[62] It is indeed partly because of the social cost caused by fighting words that the Court has placed them in a wholly proscribable category. May it then not be said that in declining to regulate fighting words, the government picks up the cost of the speech, effectively paying (or forcing other citizens to pay) for it? The regulation of fighting words then appears a mere nonsubsidy, the refusal to regulate a classic example of subsidization.[63] Under this approach to the penalty/subsidy distinction, there is no more a constitutional "penalty" on speech in *R.A.V.* than there was in *Rust*. Both involve decisions to subsidize some expressive activities and not others.

Other kinds of content-based underinclusion cases also raise, in this sense, the issue of selective subsidization. Return here to the non-public forum cases such as *Greer*, which involved speech on a military base. The donation of such public property—property whose ordinary use is to some extent incompatible with expression—constitutes a subsidy, an absorption by the public of the costs associated with allowing expressive activity in the forum. The

[62] *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942). The cost of fighting words may take a number of forms. If such words "by their very utterance inflict injury," they will at least impose a direct harm on their target; if they "tend to incite an immediate breach of the peace," they will impose as well a cost on the general public, including money spent for police protection.

[63] The same is true of the regulation of speech falling within any other category of wholly or partially proscribable expression, such as obscenity or some kinds of libel. Such regulation appears a mere nonsubsidy, in that it operates to prevent the speaker from transferring significant costs to the public; conversely, a refusal to regulate in these areas works as a subsidy, with the public determining to absorb the costs of the expression. For discussions of the way in which constitutional privileges in libel law subsidize speakers at the expense of those defamed, see Richard A. Posner, *Economic Analysis of Law* § 27.2 at 670 (Little, Brown, 4th ed 1992); Frederick Schauer, *Uncoupling Free Speech*, 92 Colum L Rev 1321, 1326–43 (1992).

denial of access to such property, by contrast, appears as a simple refusal to subsidize expression.[64] The same is true of cases arising from selective imposition of otherwise valid time, place, or manner restrictions, such as *Metromedia*. Here too, the government has determined that speech (in the form of billboards) imposes costs on the public. With respect to certain kinds of speech, that cost is absorbed by the taxpayers; with respect to other kinds of speech, the cost is thrown back on the speaker.

The ability to view all underinclusion cases in this manner again springs from their common grounding in a sphere of government discretion. As a general rule, the government has discretion to regulate or limit speech (assuming no violation of neutrality principles) precisely when such regulation plausibly may be described as a mere nonsubsidy in the sense just described. Thus, even if we view the subsidy/penalty line as appropriately defined by the direction of redistribution (from the speaker to the public or from the public to the speaker), cases such as *R.A.V.*—cases in which the government starts with general discretionary powers—appear not very different from direct funding cases like *Rust*. Whatever differences may exist in the form of the subsidy cannot be thought of constitutional significance.

But more than this may be said, for even if the penalty/subsidy distinction could serve to separate some underinclusion cases from others (*Rust*, for example, from *R.A.V.*), the distinction would remain, in the context of underinclusion cases, essentially irrelevant. Assume for the moment that the action involved in *R.A.V.* constitutes a "penalty." The First Amendment objection to the action cannot focus on the penalty itself—cannot focus, for example, on the extent to which it, relative to a subsidy, cuts off speech—given that the fighting words doctrine permits the government to penalize

[64] The relation of this analysis to public forum doctrine raises interesting questions. As previously noted, the government has a broad obligation to donate public forums for expressive purposes. The public forum cases thus might be viewed as stating an exception to the general rule that the government need not subsidize expression; indeed, I have considered public forums as forced subsidies at note 53. In keeping with the understanding of subsidies and penalties used in this discussion, however, we might consider the public forum cases not to involve subsidies at all. If public forums are at least in part defined as places compatible with expressive activity, then permitting speech in such places imposes few additional costs on the public. Cf. McConnell, *The Selective Funding Problem*, 104 Harv L Rev at 1033 (cited in note 61). This case, however, becomes more difficult to make as public forums are increasingly defined, as they have been in recent years, simply in terms of some historical criteria. See *International Society for Krishna Consciousness v Lee*, 112 S Ct 2701 (1992).

all speech of this kind. The objection instead must turn on government selectivity: the government has (dis)favored some speech on illegitimate grounds. In other words, if a selective penalty in a case like *R.A.V.* is constitutionally forbidden, the reason must have everything to do with the selection, and nothing to do with the penalty, which is, in and of itself, perfectly permissible. And if this is so, any distinction between a case like *R.A.V.* and a case like *Rust* cannot lie in the differing terms "penalty" and "subsidy." These terms should be viewed as constitutionally irrelevant; what has meaning in the cases—and in all underinclusion cases—is government selection. The Court's focus should be on this issue, and not on a set of terms bearing no real relation to it. The penalty/subsidy distinction provides meager aid in explaining *Rust*, *R.A.V.*, or any other case of content-based underinclusion.

B

Unstated in any decision, but perhaps vaguely perceived by the Justices, is another notion—this one relating to the government's own speech—that may explain the divergent outcomes in *Rust* and *R.A.V.* and, more broadly, challenge the existence of a single category of content-based underinclusion cases encompassing *Rust*, *R.A.V.*, and others. The argument starts from the premise—not undisputed but generally accepted—that the First Amendment places few limits on the government's own expressive activities; by and large, the government may speak as it chooses.[65] Of course, as a physical if not a constitutional matter, "the government" cannot speak; it can speak only through employees and agents. To say, then, that the First Amendment allows the government to speak is to say that the First Amendment allows the government (more precisely, its employees and agents) to hire employees and agents to do its speaking for it.[66]

[65] For purposes of this discussion, I accept the premise that the First Amendment imposes only minor limits on the government's own speech. For a lengthy and critical exploration of this premise, see Mark G. Yudof, *When Government Speaks* (University of California Press, 1983).

[66] The Supreme Court has indicated that the First Amendment protects even an individual's decision to hire or otherwise pay for a speaker, but also has suggested that the constitutional interest in such vicarious speech is of some lesser magnitude than the interest in direct speech. See *Buckley v Valeo*, 424 US 1 (1976) (discussing why a limitation on contributions to political campaigns poses fewer constitutional problems than a limitation on direct campaign expenditures).

From this premise emerges a claim that (at least some) government funding cases differ from all other cases of content-based underinclusion. When the government funds speech, even of hitherto private parties, the government is merely hiring agents to engage in speech for it. In paying for speech, it is speaking; if the latter is permissible, so is the former. Thus a decision like *Rust* becomes justifiable: in funding certain kinds of speech, the government effectively is engaging in the speech, and so the Constitution imposes few limits. But the same cannot be said, or so the argument goes, of a case like *R.A.V.*, which involves restrictions on the speech of private parties. The government's plenary power over its own speech provides a constitutional basis for decisions to fund expression of a particular kind, but provides no basis for decisions, even if wholly voluntary, to permit speech of a certain content.[67]

This argument can be contested on two independent grounds. The first disputes the equation of "government speech" and government funded speech. The second disputes the differentiation, with respect to "government speech," of funding decisions and other kinds of content-based underinclusion.

To appreciate some of the difficulties involved in equating government speech with government funding—because government can speak, it can fund others to speak—consider the following hypothetical: a city council enacts an ordinance providing that any person who endorses the actions of city government shall be entitled to a cash grant or tax exemption.[68] The city government itself—by which I mean municipal employees acting in their official capacity—constitutionally could engage in speech of this kind, and such speech might drown out, and hence render ineffective, countervailing expression. Given this power to speak, the hypothetical subsidy scheme cannot be attacked on the bare ground that it skews public debate about municipal government; the government's own speech also may have a skewing effect. And yet, the hypothetical

[67] I am grateful to my colleague Michael McConnell for raising this argument with me, though I do not think it should be taken (at least in this barebones form) as a statement of his position.

[68] Few would question the equivalence of a cash grant or other direct expenditure and a tax exemption, deduction, or credit in a scheme of this kind. As the Supreme Court has recognized, "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Regan v Taxation with Representation*, 461 US 540, 544 (1983). Indeed, such tax provisions frequently are referred to as "tax expenditures." See Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 Harv L Rev 491 (1985).

funding scheme seems (at the least) constitutionally problematic—far more so than what might be called direct government speech. The First Amendment problems also seem severe in a case, more closely analogous to *Rust*, in which the government makes cash grants not to the public at large, but to all political clubs for purposes of speech endorsing city government. Why do these funding programs appear to present greater constitutional difficulties than the government's own expression?[69]

As an initial matter, when the government itself speaks in favor of a position, we (the people) know who is talking and can evaluate the speech accordingly. (When the government speaks to laud itself, we may pay the speech little attention.) By contrast, when the government finances hitherto private parties to do its speaking, we may have little understanding of the source of the expression. This problem is particularly acute if we do not know of the existence of the funding scheme; then we will consistently mistake the interested for the impartial. But even if we know of the funding scheme, we will face a problem of attribution. The speakers may have engaged in the same expression without any government funding; alternatively, the speakers may have foregone their expression (or even espoused a different view) in the absence of a subsidy. We do not know whether to treat the speakers as independent or as hired guns. We thus may give the speech more (or less) weight than it deserves.

A related concern is that the funding scheme will operate to distort or influence the realm of private expression in a manner that systemically advantages public power. When the government speaks directly, it merely adds a voice (though perhaps a resounding one) to a conversation occurring among private parties. When the government speaks through subsidy schemes, it may change and reshape the underlying dialogue. What once were private choices—shall I praise the city government, criticize it, or say nothing at all?—now become in some measure governmental, as citizens calculate a set of economic incentives offered to them by government actors. The resulting choices by private individuals and organizations may give greater volume to the government's voice than the government could have achieved on its own. As

[69] For a related discussion of this question, see Cass R. Sunstein, *The Speech Market* (Free Press, forthcoming).

important, such funding schemes may subvert the very ability of a private sphere to provide a countermeasure to government power.

Rust illustrates the way in which government funding may have both more potent and more disruptive effects than direct government speech, even holding expenditures constant. The impact of the government's own speech on abortion questions likely pales in comparison to the impact of advice and counseling given to pregnant women by health care providers. (The reason relates not only to the source of the speech—an apparently independent professional—but also to the time at which it occurs.) How better, then, to communicate an anti-abortion message: through direct speech or through selective subsidization of health care providers? The latter course amplifies the government's own message at the same time as (and partly because) it wreaks havoc on the ability of those private parties in the best position to challenge the message to provide a counterweight to government authority.[70]

But even if, or to the extent that, government funding decisions can be equated with government speech, so too can other content-based underinclusive government actions. Suppose (to borrow a hypothetical from Justice Scalia's opinion for the Court in *R.A.V.*) a city council enacts an ordinance prohibiting those legally obscene works—but only those legally obscene works—that do not include an endorsement of the municipal government.[71] The hypothetical involves an exemption from otherwise permissible regulation, rather than a direct cash grant or an exemption from taxation. Yet, as shown previously, no reason exists for treating the one as different from the others. In the regulatory exemption case, the government is still paying for speech in every significant respect: the speaker receives a benefit for expressing views supportive of city government, and the government absorbs costs of the expression that normally would be borne by the speaker. The mechanism is different, but the essential act is the same. If the government

[70] I do not claim that every government funding program will pose these dangers or that no funding program should be assimilated to government speech. A funding program may be constructed in so narrow a fashion as to appear identical (or nearly so) to the government's own expression. This will be true when the constitutional concerns I have discussed are slight or absent. But as I will show, the same may be said of other (non-funding) decisions involving content-based underinclusion. The fact of funding is neither necessary nor sufficient to transform content-based underinclusive action into government expression.

[71] 112 S Ct at 2543.

"speaks" when it pays for speech by private parties, then the government is speaking in the *R.A.V.* Court's hypothetical.

The point can be made across the entire range of content-based underinclusion cases. In *Rust*, of course, the government made a direct cash grant for some kinds of expresssion, but not for others. In *R.A.V.*, which Justice Scalia saw as perfectly analogous to his obscenity hypothetical, the government offered some expression an exemption from otherwise applicable regulation of a proscribable speech category. The same mechanism is involved in cases, such as *Metromedia*, in which certain kinds of speech receive an exemption from otherwise reasonable time, place, or manner restrictions on expressive activity. And in some sense, the non-public forum cases bridge the gap: a rule that allows certain speech but not other speech on, say, a military base, as in *Greer*, can be viewed either as a direct grant (of certain rights in property, rather than of cash) or as an exemption from a generally applicable regulation prohibiting speech in a certain context. The key point is that the government actions in all these cases stand in a similar relation to government speech: in all, the government uses its powers, within a sphere of general discretion, to pick up the costs of speech—to pay for speech—of a particular content.

The argument based on government speech thus appears of limited consequence. The argument does not successfully challenge my central thesis: that there exists a single category of content-based underinclusion cases, all of which—regardless whether they involve direct funding—raise the same First Amendment issue. Nor does the government speech approach provide a comprehensive way of dealing with this issue. We can doubtless find instances of content-based underinclusion—again, some involving direct funding, some not—in which the government appears to be doing little more than speaking itself.[72] Yet surely, with respect to each

[2] In the non-public forum context, for example, we might wonder about a legal doctrine that would permit a general to speak to troops on a restricted military base about, say, alcohol use, but would preclude the general from inviting an expert on alcohol dependency to give a similar speech. An example of this kind suggests that courts might well recognize the possibility that, in a particular case, speech by a nominally private party should be treated as government speech. The inquiry should focus on the concerns mentioned above: whether the speech is clearly attributable to the government and whether the government's action, in promoting the speech, threatens to interfere with the realm of private discourse in a way direct government speech would not. Indeed, it is possible that even direct government expression should be tested by standards of a similar kind.

kind of content-based underinclusion mentioned, we will find many (almost certainly, many more) cases in which the government, through use of its discretionary funding or regulatory powers, is doing something more than speaking—is in fact influencing and shaping the world of private discourse in a way that accords with its own beliefs of what kinds of speech should be promoted. *R.A.V.* arguably is one example; *Rust* arguably is another. To treat all this as permissible government speech is to ignore the scope and effect of the government action and the constitutional problems such actions may raise. It is to evade the critical question: In a sphere of general discretion over speech, when may government prefer private speech of a certain content to private speech of another?

IV

The cases I have discussed raise a common First Amendment issue and call for a common constitutional analysis. I do not suggest that all cases of content-based underinclusion must "come out" in the same manner. I do not, for example, assert that if *R.A.V.* is right, then *Rust* must be wrong, or vice versa. I claim only that these cases, and others raising the issue of content-based underinclusion, should be subjected to the same constitutional standards.

Establishing those standards is no easy task. The problem of selective funding alone has confounded generations of judges and constitutional scholars. I have argued that selective funding cases must be assimilated to other instances of content-based underinclusion. The difficulty, therefore, far from being eased, is in fact broadened.

In this part, I thus offer a preliminary—and necessarily sketchy—view of the proper constitutional approach to cases raising the issue of content-based underinclusion. I start by sorting through, in a more concrete fashion than I have done before, the diverse and conflicting ways the Court has responded to this problem. I then suggest, taking into account the effect and motive of government action, a distinction between two kinds of content-based underinclusion: that involving subject matter, which generally is acceptable; and that involving viewpoint, which generally is not. Finally, harking back to *Rust* and especially to *R.A.V.*, I propose certain modifications to this simple division of the cases—instances in which subject matter–based distinctions should raise constitutional concern and, perhaps too, instances in which viewpoint-based distinctions should be tolerated.

The Court, failing to recognize the common problem of content-based underinclusion, has employed a variety of constitutional standards in the kinds of cases discussed in this article. At one extreme, the Court has indicated that within a sphere of general discretion, the government has near-complete freedom to make content-based distinctions with respect to speech. At the other extreme, the Court has stated that the government is barred (at least in the absence of the most compelling justification) from making any such distinctions. Between these two positions lie others, sometimes only half-articulated, premised on the notion that not all content-based distinctions are alike. Thus, the Court at times has indicated that within an area of general discretion, the government may restrict speech on the basis of subject matter or speaker, but not on the basis of viewpoint. These various standards sometimes correspond to the different contexts in which the problem of content-based underinclusion arises, so that in each context a single standard holds sway. More confusingly, a plurality of these standards may coexist and compete within even a single subcategory of content-based underinclusion cases.

The greatest disarray, as I have noted, appears in the selective funding cases, in which the Court has adopted the full range of positions just described. Prior to *Rust*, the Court had indicated that in the funding context, some kinds of content discrimination mattered profoundly, though precisely what kinds remained uncertain. Thus, in *Arkansas Writers' Project, Inc. v Ragland*,[73] the Court explicitly rejected any distinction between subject matter–based and viewpoint-based regulation, stating that all content-based regulation was subject to strict scrutiny.[74] By contrast, in *Regan v Taxation with Representation*,[75] the Court held that the government, in

[73] 481 US 221 (1987).

[74] Id at 230. The stringency of the Court's analysis may be attributable to a special concern about press regulation. The Court emphasized that "selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." Id at 228. A standard so strict applying to all funding decisions would prevent almost all government funding of expression.

[75] 461 US 540 (1983).

funding speech, could make some kinds of content-based distinctions, but suggested in dicta that funding on the basis of viewpoint would violate the Constitution.[76] Finally, in *Rust* the Court took the position that the government could fund expression as it wished, in accordance with its "value judgments."[77] In the context of funding, the whole question of content discrimination—including viewpoint discrimination—became irrelevant.

In each of the other contexts discussed in this article, the Court has concluded that even within a sphere of general discretion, the First Amendment prohibits the government from making certain kinds of content distinctions; the Court, however, has adopted a less rigorous approach in non-public forum cases than in others. In the non-public forum cases, the Court has denied the government only the power to make viewpoint distinctions; regulations based on subject matter or speaker identity, so long as they satisfy a toothless reasonableness inquiry, are permitted.[78] By contrast, in cases such as *Metromedia* or *Mosley*, in which the Court considered limited time, place, or manner regulations involving either no public property or a public forum, the Court generally has applied strict scrutiny to all content-based exemptions, regardless whether the exemptions pertain to particular viewpoints or to more general subject matter categories. Here, the Court repeatedly has held that the government "may not choose the appropriate subjects for public discourse," even if, in doing so, "the government does not favor one side over another."[79]

The Court in *R.A.V.* leaned toward the position taken in cases such as *Mosley*, although with numerous hedges and qualifications.

[76] Id at 548, 550 (disapproving funding decisions " 'aimed at the suppression of dangerous ideas' " (quoting *Cammarano v United States*, 358 US 498 (1959)); id at 551 ("[A] statute designed to discourage the expression of particular views would present a very different question.") (Blackmun concurring). The Court, in approving speaker-based funding decisions and disapproving viewpoint-based funding decisions, expressed no opinion on the permissibility of funding decisions based on the subject matter of speech. In other cases, however, the Court has treated similarly speaker-based and subject matter–based restrictions, distinguishing both from restrictions based on viewpoint. See, for example, *Perry v Perry*, 460 US 37 (1983); *Cornelius v NAACP*, 473 US 788 (1985).

[77] 111 S Ct at 1772.

[78] Thus, for example, the Court in *Greer v Spock*, 424 US 828 (1976), allowed a military base to exclude all partisan political speakers, and the Court in *Lehman v City of Shaker Heights*, 418 US 298 (1974), permitted a muncipal transportation system to refuse to post political advertisements. See also *Cornelius*, 473 US at 806; *Perry*, 460 US at 49.

[79] *Metromedia, Inc. v San Diego*, 453 US 490, 515, 518 (1981) (plurality); see *Carey v Brown*, 447 US 455, 460–61, 462 n 6 (1980); *Police Dep't v Mosley*, 408 US 92, 95, 99 (1972).

The *R.A.V.* Court, of course, ruled that at least some content-based distinctions within a proscribable category of speech violate the Constitution: "the First Amendment imposes . . . a 'content discrimination' limitation upon a State's prohibition of proscribable speech."[80] But what is the exact content of this limitation? The Court made clear that in the context of proscribable speech, the constitutional ban extends beyond explicit viewpoint-based distinctions; indeed, in the first statement of its holding, the Court declared the St. Paul law unconstitutional because it made distinctions "solely on the basis of the subjects the speech addresses."[81] Yet the Court declined to say that in this sphere the First Amendment renders suspect all content-based restrictions: "the prohibition against content discrimination is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech."[82] Repeatedly asking whether a regulation would pose a "significant danger of idea or viewpoint discrimination," the Court listed a series of constitutionally unobjectionable content-based distinctions.[83] The list closed with the suggestion that, within a proscribable category of speech, content-based distinctions may be permissible so long as they present "no realistic possi-

[80] 112 S Ct at 2545.

[81] Id at 2542. The Court later concluded that the ordinance also discriminated with regard to viewpoint, but as I will discuss, this argument at least raised questions; the Court's decision thus depended heavily on the ban on subject matter restrictions. With respect to this ban, the majority opinion differed not only from Justice White's approach, but also from Justice Stevens's alternative analysis. Unlike Justice White, Justice Stevens would view certain content-based distinctions within proscribable categories of speech as constitutionally troubling. But Justice Stevens, unlike the *R.A.V.* majority, apparently would accord automatic strict scrutiny only to those content distinctions based explicitly on viewpoint. See id at 2568–69.

[82] Id at 2545.

[83] Id at 2545–47. First on the list were distinctions supported by the very factor that rendered the entire category of speech proscribable. To use one of Justice Scalia's examples, the government could prohibit, from the broad category of legally obscene materials, only the "most lascivious displays of sexual activity." Id at 2546. As each of the concurrences noted, this exception may have covered the St. Paul ordinance, which reasonably could be viewed as an attempt to prohibit, from the entire category of fighting words, those which "by their very utterance" inflict the greatest injury or pose the greatest danger of retaliatory violence. See id at 2556, 2565. Justice Scalia also excepted from rigorous constitutional scrutiny laws containing content distinctions based on the "secondary effects" (i.e., noncommunicative effects) of speech, as well as laws directed against conduct but incidentally covering a content-based subcategory of proscribable speech. See id at 2546–47. Finally, Justice Scalia would have viewed more leniently (although his reasoning on this count is mysterious) a prohibition of speech falling within a proscribable category that is "directed at certain persons or groups," id at 2548—yet another exception that reasonably could have been used to insulate the St. Paul ordinance from strict review.

bility that official suppression of ideas is afoot."[84] Whether a regulation prohibiting expression on certain subjects ever could fall within this "general exception" to the ban on content discrimination was left uncertain.

What then is the right approach? When, if ever, will some manner of content-based underinclusion invalidate a speech regulation? As I have said, the same constitutional standards should govern all of the various kinds of cases discussed in this article. I do not mean to suggest that the government interests underlying the underinclusive regulation of speech will be identical in all contexts. The nature of the government action at issue—for example, direct funding of speech or regulation of speech within a non-public forum—will sometimes provide distinctive justifications for content-based underinclusion.[85] Thus, in acting as manager of a military base, the government may have—as it claimed to have in *Greer*—peculiar reasons for restricting some speech, such as the interest in insulating a military establishment from partisan political causes. Similarly, in providing direct funding out of public coffers, the government frequently will have to take into account the limited availability of revenues devoted to a particular program or purpose. But because each kind of government action discussed in this article affects First Amendment rights in the same way, each should be held to the same set of justificatory burdens. The remaining question concerns the appropriate content of these burdens. That question is best approached by focusing on the nature of the First Amendment problem in all of these cases.

Thus recall what the Court confronts in each one of these contexts. The government is operating within a sphere of general discretion: it can refuse to promote or allow any speech at all. Instead, the government chooses to advance or permit some, but not other, speech on the basis of content. If the Court strikes down the action, citing content discrimination, the government can return to a general ban, becoming (in terms of total quantity of speech) more, rather than less, speech restrictive. The government can prohibit all fighting words, can bar all speakers from a military base, can

[84] Id at 2547. As an illustration of a content-based distinction posing no threat of censorship of ideas, Justice Scalia hypothesized an ordinance prohibiting only those obscene motion pictures featuring blue-eyed actresses.

[85] Cf. Sullivan, 102 Harv L Rev at 1503 (cited in note 58); Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 BU L Rev at 607 (cited in note 58).

prevent any person from using a noisy soundtruck, can decline to fund any speech. If all this is so, one way to approach the problem at least becomes clear. What we need to ask is when content discrimination resulting in more speech is of greater constitutional concern than content neutrality resulting in less. We can begin, in other words, to tackle the essential issue in all of these cases by rephrasing it (somewhat crudely) in the following terms: When is some speech worse than none?[86]

A proper response to this inquiry should focus on both the effects and the purposes of content-based underinclusive action. In other words, government regulation allowing some speech may raise greater constitutional problems than regulation allowing no speech at all either because the former has graver consequences than the latter or because the former more likely proceeds from an improper impulse. Both considerations suggest an initial, broad distinction between underinclusive action based on viewpoint and underinclusive action based on subject matter.

Consider first the possible consequences of underinclusive regulation of speech on the realm of public discourse.[87] Sometimes, such regulation will place particular messages at a comparative disadvantage and, in doing so, will distort public debate. An example is Justice Scalia's hypothetical ordinance prohibiting all legally obscene materials except those containing an endorsement of city government. Such a law leaves untouched speech supportive of city government, while restricting speech critical of city government, thereby skewing discourse on this issue. That obscenity (like fight-

[86] It might be argued that framing the inquiry in this way assumes unjustifiably that the government will respond to the invalidation of a content-based distinction by expanding the reach of the speech restriction, rather than by eliminating it entirely. This objection recognizes, quite correctly, that in some circumstances an apparently "greater" power is in fact practically or politically constrained; in that event, if the "lesser" power is removed, the government will not exercise its authority at all. See Kreimer, 132 U Pa L Rev at 1313 (cited in note 58). But in the settings discussed in this article, the objection appears to have only slight weight. The more expansive powers here—enacting limited time, place, or manner restrictions, establishing broad speech restrictions for non-public forums, declining to fund speech, proscribing categories of speech like fighting words or obscenity—are in most instances not merely theoretically but actually available; the government very frequently exercises such powers. We indeed may wish to keep in mind that in some cases, the government as a practical matter will not be able to—or, perhaps more frequently, will not wish to—expand the coverage of a speech restriction, but the central inquiry in these contexts remains as I have described it in the text.

[87] See Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 198–200, 217–27 (cited in note 40), for a full discussion of these issues in connection not with content-based underinclusion, but with content-based discrimination generally.

ing words) is by definition unprotected makes no difference to the analysis; the distortion relates to ideas and messages extrinsic to that category. It is true that the distorting effect occurs at the margin; persons opposed to city government can communicate this message through means other than obscenity. Yet the ordinance remains more constitutionally problematic than a total ban on obscenity, which would have no skewing effect at all on the debate concerning city government.[88] Precisely the same point can be made in the context of direct funding. Assume our city council, informed of the decisions in *R.A.V.* and *Rust*, instead passed a law providing for public funding of all speech endorsing incumbent city officials in their campaigns for reelection. Such a law similarly provides a comparative advantage to messages of endorsement, thereby again skewing public debate. As with the obscenity statute, the skewing effect makes the statute more troublesome than a complete absence of public funding.[89]

Not all instances of content-based underinclusion, however, will have such problematic effects. Contrast to the viewpoint-based laws used above a set of regulations discriminating in terms of general subject matter. First, suppose that the city council enacts a law prohibiting all obscene materials except those dealing in any way with government affairs. It is no longer so clear that a total ban on obscenity would better serve First Amendment interests. At least facially, the law does not skew public debate about matters

[88] Of course, a total ban on obscenity removes all obscene messages from the world of public discourse, which in some other world might be thought a constitutional problem of large dimension. The premise here—accepted by the Supreme Court—is that eliminating obscenity per se from the realm of public debate raises no First Amendment problem whatsoever. A premise of similar kind exists in all cases of content-based underinclusion.

[89] The notion of a skewing effect, as set forth in the text, of course assumes that distortion arises from government, rather than from private, action. That assumption may be misplaced. If there is "too much" expression of a particular idea in an unregulated world, then government action specially disfavoring that idea might "un-skew," rather than skew, public discourse. See Fiss, 100 Harv L Rev at 786–87 (cited in note 53); Sunstein, *Free Speech Now*, 59 U Chi L Rev at 295–97 (cited in note 53). An understanding of this point has special relevance in considering underinclusive government action. With respect to such actions, the only constitutional worry is equality among ideas: restriction, taken alone, need not concern us. The situation is very different in the case of other kinds of speech restrictions, whose unconstitutionality may rest as much or more in considerations of personal autonomy as in considerations of equality. See generally David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334 (1991). Nonetheless, I think the assumption used here to measure distortion is generally, although not invariably, proper. Any other would allow the government too great—and too dangerous—an authority to decide what ideas are overrepresented or underrepresented in the market.

involving government, as the viewpoint-based obscenity ordinance did.[90] Of course, the law allows the use of obscene materials to speak about government affairs, while restricting the use of those materials to speak about a host of other subjects. But neither those who wish to speak on such subjects nor their potential audience can claim in any real sense that the ordinance harms them more than would a ban on all obscene materials. The law, viewed solely in terms of effects on public debate, thus appears consistent with the First Amendment. And once again, the same is true of a similar statute involving the mechanism of direct funding. Assume that the city council passes a law providing for public funding of all candidates for elected office. Here too, the statute makes a content-based distinction: one kind of speech is funded, all other speech is not. But as long as the law covers all candidates and parties, no one can complain that the subsidy plan has effects on public debate that are constitutionally more troublesome than a refusal to subsidize at all.[91]

Yet effects are not all that matter in considering the permissibility of content-based underinclusion; we also must take into account the purposes underlying the government action.[92] Notwithstanding that another, more speech restrictive action could have been taken (assuming a proper purpose), the purpose of *this* action—the action in fact taken—must fall within the range of constitutional legitimacy. What objectives fall outside that range? It is a staple of First Amendment law that no government action may be taken because public officials disapprove of the message communicated. The flip side of this principle, as Geoffrey Stone has noted, is that "the government may not exempt expression from an otherwise general restriction because it agrees with the speaker's views."[93] Thus, as the *R.A.V.* Court stated: "The government may not regulate use [of fighting words] based on hostility—or favoritism—towards the

[90] I consider at text accompanying note 110 problems relating to viewpoint-differential consequences of such facially viewpoint-neutral laws. It may well be that this statute looks sufficiently odd to heighten concerns about such consequences.

[91] In covering all parties and candidates, the hypothetical statute stands on firmer ground than the subsidy scheme approved in *Buckley v Valeo*, 424 US 1 (1976), which funds some candidates and not others and thus may well distort debate on critical public matters.

[92] Again, Geoffrey Stone provides a fuller discussion of these issues, in the context of discussing content-based discrimination generally, in *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 212–17, 227–33 (cited in note 40).

[93] Id at 228.

underlying message expressed."[94] Other constitutionally disfavored justifications for government action also appear in the cases—most notably, that the government may not restrict expression because it will offend others. Once again, as said in *R.A.V.*, selective limitations on speech may not be justified by "majority preferences."[95] Regardless whether the government could achieve the same or greater effects with another end in mind, the existence of such illegitimate aims should invalidate the action at issue.

The distinction between viewpoint-based restrictions and subject matter–based restrictions serves as a useful proxy in evaluating the purpose, as in evaluating the effects, of underinclusion. A return to the set of hypotheticals offered above illustrates this point. The actions singling out for favorable treatment endorsements of city government can be presumed to stem from an illegitimate motive: what legitimate reason could lie behind these regulations? A similar danger presents itself with regard to any government action favoring or disfavoring a particular viewpoint: if suppression of the viewpoint does not lie directly behind the action, at least attitudes toward the viewpoint may influence the decision.[96] By contrast, government actions covering speech of a variety of viewpoints, even if on a single topic, less probably emerge from government (or majority) approval or disapproval of a particular message, precisely because they apply to a range of diverse messages. So, for example, the statute providing funds for campaign speech likely stems from a desire to reduce corruption, and the ordinance granting an exemption to obscenity involving discussion of government affairs may arise from the view (common and usually permissible in First Amendment law, though reflecting a kind of favoritism) that political speech is of special constitutional value.[97] The key point is that just as subject matter restrictions will less often skew debate than viewpoint restrictions, so too will they less often arise from constitutionally improper justifications.[98]

[94] 112 S Ct at 2545.

[95] Id at 2548.

[96] See Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 231 (cited in note 40).

[97] Again, however, this hypothetical regulation seems so eccentric that a closer examination into both purpose and effects might be in order. See note 90 and text at note 110.

[98] See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U Chi L Rev 81, 108 (1978).

So far, then, we appear to have a simple way to test government action of the kind this article addresses. Viewpont-based regulation should receive the strictest constitutional scrutiny, both because it skews public debate in a way a general ban (or refusal to subsidize) would not and because it more likely arises from an impermissible motive. By contrast, subject matter–based regulation, which generally raises concerns of purpose and effect no greater than would a general ban, should receive less searching examination, involving (as in the case of content-neutral regulations) a general balancing analysis.

Thus, for example, in *Rust*, the Court first would decide whether the selective subsidization rested on the speaker's viewpoint. There seems little serious argument on this score: the regulations, quite explicitly, prohibited funded projects from "encourag[ing], promot[ing] or advocat[ing] abortion," as well as from engaging in abortion referral and counseling; at the same time, the regulations permitted funded projects to engage in anti-abortion advocacy and required them to refer women for prenatal care and adoption services.[99] Once the determination of viewpoint discrimination is made in this manner, a strong presumption of unconstitutionality would attach, rebuttable only upon a showing of great need and near-perfect fit. If the government could not make this showing, the subsidization scheme would be struck down, leaving the government with the option of funding either less or more speech relating to abortion.

This result accords with the principles, relating to the purpose and effects of government regulation, underlying a strict presumption against viewpoint-based underinclusion. The regulations at issue in *Rust* can hardly be understood except as stemming from government hostility toward some ideas (and their consequences) and government approval of others: the subsidization scheme, as the majority itself noted, reflected and incorporated a "value judgment."[100] Further, the regulations, in treating differently opposing points of view on a single public debate, benefitted some ideas at the direct expense of others and thereby tilted the debate to one side. For both these reasons, a refusal to fund any speech relating to

[99] 42 CFR §§ 59.8(a)(2), 59.8(b)(4), 59.10, 59.10(a) (1990); 53 Fed Reg 2927 (1988).

[100] 111 S Ct at 1772.

abortion would have been constitutionally preferable to the funding scheme that the regulations established.

Before this analysis becomes too comfortable, however, a final look at *R.A.V.* is in order. That case, far more than *Rust*, poses serious challenges—on every level—to the simple approach suggested so far: to the ability to distinguish between viewpoint-based and subject matter–based underinclusion, to the relaxed constitutional standard applying to subject matter–based underinclusion, and to the presumed impermissibility of viewpoint-based underinclusion. In so doing, *R.A.V.* forces modifications to the analytical structure presented thus far, as well as a continued willingness to test that structure against the concerns of purpose and effect giving rise to it.

To see the difficulties *R.A.V.* presents, we should consider, as an initial matter, whether the St. Paul ordinance discriminated on the basis of viewpoint or subject matter. This undertaking involves three separate inquiries: first, whether the ordinance on its face discriminated on the basis of viewpoint or subject matter; second; whether the ordinance in practice discriminated on the basis of viewpoint or subject matter; and third, which measure of discrimination (facial or operational) is to control if the answers to the first two questions differ. In exploring these issues, and attempting to draw more general lessons from them, I will refer frequently to Justice Scalia's and Justice Stevens's contrasting characterizations of the St. Paul ordinance.

Viewed purely on its face, the St. Paul ordinance, as construed by the Minnesota Supreme Court, appears to discriminate only on the basis of subject matter. The ordinance proscribed such fighting words as caused injury on the basis of race, color, creed, religion, or gender—that is, such fighting words as caused injury on the basis of certain selected topics. For this reason, Justice Stevens viewed the ordinance as at most a subject matter restriction:[101] all fighting words, uttered by any speaker of whatever viewpoint, concerning another person's "race, color, creed, religion, or gender" were forbidden. Even Justice Scalia frequently referred to the ordinance in this manner; in apparent acknowledgment of the

[101] Justice Stevens initially argued that the ordinance was based neither on viewpoint nor on subject matter, but only on the injury caused by the expression. 112 S Ct at 2570. For discussion of this point, see text at notes 116–17.

statutory language, he described the law as regulating expression "addressed to . . . specified disfavored topics," as policing "disfavored subjects," and as "prohibit[ing] . . . speech solely on the basis of the subjects the speech addresses."[102] Thus, if the analysis I have proposed is correct, and if a law is to be classified as viewpoint based or subject matter based solely by looking to the face of the statute, then Justice Scalia erred in finding the discrimination worked by the statute to be unconstitutional.

Beyond the question of facial discrimination, however, lurked another issue: Did the statute discriminate in its operation on the basis of viewpoint? Justice Stevens insisted that it did not. Describing how the ordinance would apply to both sides of a disputed issue, Justice Stevens noted: "[J]ust as the ordinance would prohibit a Muslim from hoisting a sign claiming that all Catholics were misbegotten, so the ordinance would bar a Catholic from hoisting a similar sign attacking Muslims."[103] Or (to take a simpler example) just as the ordinance would prevent the use of racial slurs by whites against blacks, so too would it prevent the use of racial slurs by blacks against whites.[104] Justice Scalia admitted this much, but nonetheless suggested that the ordinance operated in a viewpoint discriminatory manner. In some debates, Justice Scalia reasoned, the regulation would "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[105] As an example, Justice Scalia noted that a sign saying that all Catholics were misbegotten would be prohibited, because the sign would insult on the basis of religion, but a sign saying that all anti-Catholic bigots were misbegotten would be permitted.

The conflict between Justice Scalia and Justice Stevens on this point serves as a reminder that the decision whether a statute dis-

[102] 112 S Ct at 2542, 2547; see id at 2570 (Stevens dissenting).

[103] 112 S Ct at 2571. Justice Stevens assumed in this example that the signs would constitute fighting words.

[104] Akhil Amar makes the interesting point that Justice Stevens seemed to go out of his way to avoid this obvious example, using instead a hypothetical involving two minority groups. Amar notes too that Justice White's opinion appeared to assume that the statute was asymmetrical, in the sense that it protected vulnerable social groups from dominant social groups, but not vice versa. See Amar, 106 Harv L Rev at 148–50 (cited in note 24). To the extent the statute is read in this manner—and Amar points out that the explicit examples in the statute (burning crosses and swastikas) are consistent with this reading—the viewpoint discrimination inherent in the statute becomes quite obvious.

[105] Id at 2548.

criminates on the basis of viewpoint may be highly contestable.[106] The very notion of viewpoint discrimination rests on a background understanding of a disputed issue. If one sees no dispute, one will see no viewpoints, and correspondingly one will see no viewpoint discrimination in any action the government takes.[107] Similarly, how one defines a dispute will have an effect on whether one sees a government action as viewpoint discriminatory. Justice Stevens understood the public debate on which the St. Paul ordinance acted as a dispute between racism of different stripes.[108] With respect to this dispute, the ordinance took a neutral position and effected a neutral result. Justice Scalia, by contrast, saw the dispute as one between racists and their targets and/or opponents. With respect to this dispute, the ordinance appeared to take a side. By prohibiting fighting words based on race, while allowing other fighting words, the law barred only the fighting words that the racists (and not the fighting words that their targets) would wish to use.

In this conflict, Justice Scalia seems to me to have the upper hand: the St. Paul ordinance, in operation, indeed effected a form of viewpoint discrimination. We can all agree that a law applies in a viewpoint discriminatory manner when it takes one side of a public debate. We should also all be able to agree that one way of taking sides is by handicapping a single contestant—and further, that one way of handicapping a contestant is by denying her a particular means of communication (such as fighting words).[109] The

[106] The difficulty may arise in considering either facial or operational viewpoint discrimination. Had the ordinance, on its face, prohibited all racist fighting words, the debate between Justice Scalia and Justice Stevens presumably would have been the same. Justice Stevens would have argued that the statute on its face did not discriminate on the basis of viewpoint because it prohibited all kinds of racist fighting words. Justice Scalia, by contrast, would have argued that the statute was facially viewpoint discriminatory because it prohibited the fighting words used by racists, but not the fighting words directed at them.

[107] See Catharine A. MacKinnon, *Feminism Unmodified* (Harvard, 1987) at 212 ("What is and is not a viewpoint, much less a prohibited one, is a matter of individual values and social consensus.").

[108] Justice Stevens at one point acknowledges a debate between proponents of bigotry and proponents of tolerance, but he insists that the ordinance also is neutral with respect to this debate. Thus, Justice Stevens says that the "response to a sign saying that 'all [religious] bigots are misbegotten' is a sign saying that 'all advocates of religious tolerance' are misbegotten.' " 112 S Ct at 2571. This statement has a lovely symmetry, but also a sense of unreality. Presumably, bigots wish to direct their speech not to abstract advocates of tolerance, but to members of a despised group. The question *R.A.V.* presents is whether the government can impose limits on the bigots' desire to do so. Here, Justice Stevens ignores this issue by reframing the public debate.

[109] That a regulation deprives a speaker only of a particular means of communication does not make the regulation any less an example of viewpoint discrimination. Indeed, almost all

St. Paul ordinance, it is true, handicaps both sides (and therefore neither side) when Jews and Catholics, whites and blacks scream slurs based on religion or race at each other. But surely race-based fighting words occur (indeed, surely they usually occur) in something other than this double-barreled context. In most instances, race-based fighting words will be all on one side, because only racists use race-based fighting words, and racists usually do not assail only each other. When the dispute is of this kind, the government effectively favors a side in barring only race-based fighting words. To put the point another way, if a law prohibiting the display of swastikas takes a side, no less does a law that punishes as well the burning of crosses.

Yet even if this is so, the question remains how to categorize a statute (such as the St. Paul ordinance) that discriminates on the basis of viewpoint only in operation, and not on its face. Do we classify the St. Paul ordinance as a subject matter restriction (in keeping with the face of the statute) or as a viewpoint restriction (in keeping with the way it works in practice)? Or, to put the question in a more meaningful way, regardless of the label we attach to the statute, do we treat it as discriminating on the basis of viewpoint or of subject matter?

When a statute has so unbalanced a practical effect as the St. Paul ordinance, I think, it must be treated in much the same manner as a statute that makes viewpoint distinctions on its face. I have argued that underinclusive actions based on subject matter generally should receive relaxed scrutiny because they pose little danger of skewing public debate on an issue or arising from an illegitimate motive; thus, they usually will be no worse (and because less speech restrictive, often a great deal better) than a refusal to allow or subsidize any speech at all. But a subject matter restriction of the kind in *R.A.V.* flouts this reasoning. Here, the restriction, although phrased in terms of subject matter, meaningfully applied only to one side of a debate and thus had a tilting effect as profound as a

cases of underinclusion function only to remove a particular means of communication from the speaker: the speaker may not use fighting words; the speaker may not use a noisy soundtruck; the speaker may not use the grounds of a military base; the speaker may not use government funds. In all of these cases, the government does not act to eliminate completely an idea from the realm of public discourse, but may nonetheless take a side. That the government's action deprives a speaker only of a means of communication is relevant, if at all, not to the question whether the action is viewpoint-based, but to the question whether, even if viewpoint-based, the action should be allowed.

viewpoint-based regulation; the ordinance, though facially prohibiting "race-based" fighting words, might as well have prohibited racist fighting words—that is, fighting words expressing the view of racism. And precisely because the law operated in this way, the likelihood that it stemmed from impermissible motives must be treated seriously; knowing that the ordinance would restrict only a particular point of view, legislators might well have let their own opinion, or the majority's opinion, of that viewpoint influence their voting decision.[110] The ordinance thus presented the same dangers as a facially viewpoint-based speech regulation.

It might be argued that in admitting this much, I have compromised fatally the position that underinclusive actions based on subject matter generally should not be subject to strict constitutional scrutiny. After all, many subject matter restrictions have viewpoint-differential effects; in all such cases, it might be said, precisely the same arguments for strict scrutiny would apply. Further, the argument might run, it may be difficult to distinguish these subject matter restrictions from others, and it may be wise as a general matter to overprotect speech; thus, we perhaps should look upon all subject matter restrictions with suspicion. But this argument ignores the special feature of underinclusion cases: that in such cases, invalidating a subject matter restriction will as likely (perhaps more likely) lead to less, as to more, expression. In this kind of case, a defensive, overprotective approach seems inappropriate: we should treat subject matter restrictions harshly only when they pose real dangers of distorting effects or impermissible motive. To the extent, then, that the *R.A.V.* opinion stands for the proposition that all content-based underinclusion violates the Constitution,[111] the opinion is in error.

This aspect of the analysis, no doubt, raises difficult questions. One set involves the determination at what point the viewpoint differential effects of a regulation that on its face involves subject matter alone should begin to give rise to suspicion. Need we worry only about statutes such as that involved in *R.A.V.*, in which the

[110] As the *R.A.V.* Court noted, St. Paul argued that the law was necessary, among other reasons, to show that speech expressing hatred of groups was "not condoned by the majority." 112 S Ct at 2548. It is difficult to conceive of a more illegitimate purpose for regulating speech.

[111] See text at notes 80–84 for discussion of the ambiguity of the *R.A.V.* opinion on this question.

regulation effectively restricts one side alone, or need we worry too about statutes with lesser, but still noticeable, viewpoint-based effects? Another set of questions involves the technique used to identify troublesome regulations. Should we use case-by-case analysis, or should we try to devise some more general standard to separate out the most dangerous restrictions based facially on subject matter? Whatever the precise answers to these questions, though, the basic point remains: on some occasions, a regulation that on its face involves only subject matter must be treated as if it involved viewpoint; on most occasions, it need not.

In this statement, however, a final question lurks: When, if ever, may we tolerate viewpoint-based underinclusive actions? Suppose, for example, that the government wished to fund private speech warning of the dangers of tobacco. Would the government also be required to fund private speech minimizing the health risks associated with smoking? One answer to this question is to insist on strict viewpoint neutrality in the support of private speech; then, if the government wished to express an anti-smoking message, it would have to disdain private speech and do the job itself. Yet this answer runs contrary to many of our intuitions. The same point can be made by using a hypothetical along the lines of *R.A.V.* Suppose that the government banned all (but only) those legally obscene materials that featured actors smoking cigarettes. Would this action seem any more objectionable than the example Justice Scalia gave of innocuous selectivity within a proscribable category—the prohibition of all (but only) those obscene materials featuring blue-eyed actresses?[112] The smoking ordinance may seem, if anything, less troublesome; it, at least, has a reason. And yet the ordinance discriminates on the basis of viewpoint.

I cannot here consider in detail the circumstances in which viewpoint-based underinclusion should be upheld. I will note, however, a few points that may serve to structure future inquiry regarding this issue. These relate, first, to the possibility that some viewpoint-based underinclusion may be adequately justified even under a compelling interest test, and, second, to the more remote possibility that some viewpoint-based underinclusion need not be subjected at all to this most stringent standard.

[112] 112 S Ct at 2547.

The initial point is—or should be—obvious: strict scrutiny need not invalidate a viewpoint-based underinclusive action. The test, as stated by the Court, is whether the regulation is both necessary and narrowly tailored to serve a compelling interest.[113] In *R.A.V.*, the Court mistakenly interpreted this test to create a *per se* rule against viewpoint underinclusion. Action of this kind, the Court said, is never necessary, because the government can always enact a broader speech regulation.[114] But if the speech additionally covered by a broad regulation fails to advance the interest asserted, why must the government restrict it as well? Assume, for example, that the government has a compelling interest in ensuring that children do not start smoking; assume as well that speech extolling cigarettes in the immediate vicinity of a school leads children to start smoking. Must the government, to prevent this speech, enact a law that restricts speech in the vicinity of schools to the full extent allowed under the Constitution? Would such a law be either "necessary" or "narrowly tailored" to serve the asserted interest? The questions answer themselves. A viewpoint-based underinclusive action should not be held invalid (as it was in *R.A.V.*) on the mere ground that it is, by definition, underinclusive. If the government can show—if, for example, St. Paul could have shown—that it has a compelling interest, that it must regulate speech to achieve that interest, and that it has regulated all (but only) such speech as is necessary to achieve the interest, then the government action should pass strict scrutiny.[115]

The second point I make more tentatively: indeed, I pose it as a question: Must all viewpoint-based underinclusive actions be subject to strict scrutiny, or are there some "viewpoints" that in the context of underinclusion need not be treated as such? The examples I have used, relating to viewpoints on tobacco use, seem to suggest that not all viewpoints are alike, although it is difficult to fashion a principled reason why. If our intuitions rebel against the idea that the government cannot fund speech discouraging

[113] See, for example, *Perry v Perry*, 460 US 37, 45 (1983); *Cornelius v NAACP*, 473 US 788, 800 (1985).

[114] See 112 S Ct at 2550.

[115] See *Burson v Freeman*, 112 S Ct 1846 (1992), for a recent First Amendment case in which the Court understood the compelling interest standard in this manner (although perhaps misapplied it). In keeping with the essential thesis of this article, I believe this standard should govern in all cases of viewpoint-based underinclusion, including funding decisions.

smoking without also funding its opposite, they do so for some combination of three reasons, each of which exists in tension with common First Amendment principles. First, the debate in this case, by its nature, offers the hope of right and wrong answers—answers subject to verification and proof. Second, society has reached a shared consensus on the issue; the answers, in addition to being verifiable, are widely believed. And third—and most important—one side of the debate appears to do great harm. When these factors join, a viewpoint regulation may appear justifiable whenever a more general regulation could exist. Then, government disapproval of a message may seem no longer illegitimate, because the disapproval emerges from demonstrable and acknowledged harms; then too, the distortion of debate resulting from the government action may appear not vice, but virtue. Some speech here seems better than none.

Justice Scalia's and Justice Stevens's opinions in *R.A.V.* included a debate on just these issues. Justice Stevens first characterized the St. Paul ordinance not as viewpoint-based, not even as subject matter–based, but as injury-based: the ordinance banned speech that caused a special and profound harm. Justice Scalia mocked this approach, dismissing it as "word-play": "What makes the [injury] produced by violation of this ordinance distinct from the [injury] produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message."[116] Replied Justice Stevens: the Court failed to comprehend "the place of race in our social and political order"; were it to do so, it would recognize that race-based fighting words were a grave social evil, causing "qualitatively different" harms from other fighting words.[117] St. Paul, on this view, had done nothing more than respond, neutrally and legitimately, to real-life concerns; and any resulting skewing effect, given these concerns, need hardly trouble us. To put the position most starkly (more starkly than Justice Stevens did): Even if, in some technical sense, the statute involved viewpoint, it was viewpoint we could cease to recognize as such for purposes of constitutional analysis.

The position of Justice Stevens cannot be right as a general matter. Almost all viewpoint-based regulations can be viewed as "harm-based" regulations, responding neutrally not to ideas as

[116] 112 S Ct at 2548.

[117] Id at 2565, 2570 n 9.

such, but to their practical consequences. We may indeed take as a given that almost all viewpoints anyone would wish to restrict cause arguable harms in some fashion. So, for example, in *Rust*, supporters of the regulations might argue that the selective funding corresponds not to viewpoints, but to demonstrable injuries (in the eyes of many) produced by abortion advocacy and counseling. And were we to treat such a case differently on the ground that there is no consensus on the "harmfulness" of this speech's consequences, then we would transform the First Amendment into its opposite—a safe haven for only accepted and conventional points of view.

Yet Justice Scalia's studied refusal to acknowledge or discuss the injuries caused by the speech in *R.A.V.* remains troubling. Here we have speech that, taken alone, has no claim to constitutional protection. The government responds to the special nature of this speech—to the special evil it causes—by in fact refusing to protect it. Perhaps this harm should be evaluated only in determining whether the government has met its high burden of justifying a distinction based on viewpoint. (Certainly, contrary to Justice Scalia's approach, the harm should be evaluated for this purpose.) The question that remains open for me is whether profound and indisputable harms can be taken into account for the purpose of lowering the standard of review applicable to viewpoint-based underinclusion—whether and when they may negate our usually justifiable concerns about the effects and motive of such government action. It may be possible to develop guidelines for this purpose—guidelines that will isolate and harshly confine a set of underinclusion cases in which viewpoint distinctions should be tolerated. But until we perform this feat, we could do far worse than to rely on a no-viewpoint distinction rule to handle cases of content-based underinclusion.

V

For now, it may be less important to solve the problem of content-based underinclusion than to understand that there is a problem to be solved. My claim throughout this article has been that a certain set of cases—cases generally treated as if they have nothing in common with each other—raise a common issue and demand a common answer. The cases come in four general categories. The two most recently treated by the Court (though in widely

divergent ways) are typified by *Rust* and *R.A.V.*, the former involving selective funding of speech, the latter involving selective bans on speech within a wholly proscribable speech category. Add to these two others: cases involving selective bans on speech within a non-public forum and cases involving selective imposition of otherwise reasonable time, place, or manner restrictions, whether or not related to government property. The cases differ in context, but they share a structure transcending dissimilarities—a structure calling for acknowledgment by the Court and an effort to devise a uniform approach.

The problem these cases present is a problem of First Amendment neutrality, in as stark a form as can be found. In all these cases, the government may refuse to allow or subsidize any speech; the question remains when the government may refuse to allow or subsidize some (but not all) speech on the basis of content—when the government may give a special preference to expression of a certain kind. The cases cannot be distinguished by means of the subsidy/penalty distinction. The government action in all of these cases can be viewed as a subsidy; in each, the government voluntarily favors—and pays for—a certain kind of expression. More, labeling the action a subsidy or penalty is in these cases immaterial; assuming the government action constitutes a penalty, the problem lies not in the penalty itself, but in the government's selectivity—a problem that remains in the exact same form if the action is viewed a subsidy. For much the same reasons, the cases also cannot be distinguished by resort to an expansive notion of government speech. The action in all of these cases can be so characterized; and unless the government speech analogy has a power so far unsuspected in First Amendment law, it cannot displace the core issue in the cases. That issue must be confronted in whatever context it arises: when the government need not protect or promote any speech—when the speech itself has no claim upon the First Amendment—what limits remain on the government's power of selection?

I have suggested one approach to the problem; no doubt there are others worthy of attention. And were the Supreme Court to address the question in this way, no doubt the Justices would differ with respect to the solution. At least then, however, the debate in these cases would concern what under the First Amendment should matter. The answer might remain unclear, but the Court would have understood the question.

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FOR JUSTICE MARSHALL

Elena Kagan

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For Justice Marshall

Elena Kagan*

A few days after Thurgood Marshall's death, I stood for a time at his flag-draped casket, then lying in state at the Supreme Court, and watched the people of Washington celebrate his life and mourn his passing. There would be, the next day, a memorial service for the Justice in the National Cathedral, a grand affair complete with a Bible reading by the Vice President and eulogies by the Chief Justice and other notables. That service would have its moments, but it would not honor Justice Marshall as the ordinary people of Washington did. On the day the Justice's casket lay in state, some 20,000 of them came to the Court and stood in bitter cold for upwards of an hour in a line that snaked down the Supreme Court steps, down the block, around the corner, and down the block again. The Justice's former clerks took turns standing at the casket, acting as a kind of honor guard, as these thousands of people filed by. Passing before me were people of all races, of all classes, of all ages. Many came with children and spoke, as they circuited the casket, of the significance of Justice Marshall's life. Some offered tangible tributes—flowers or letters addressed to Justice Marshall or his family. One left at the side of the casket a yellowed slip opinion of *Brown v. Board of Education*.[1] There never before has been such an outpouring of love and respect for a Supreme Court Justice, and there never will be again. As I stood and watched, I felt (as I will always feel) proud and honored and grateful beyond all measure to have had the chance to work for this hero of American law and this extraordinary man.

I first spoke with Justice Marshall in the summer of 1986, a few months after I had applied to him for a clerkship position. (It seems odd to call him Justice Marshall in these pages. My co-clerks and I called him "Judge" or "Boss" to his face, "TM" behind his back; he called me, to my face and I imagine also behind my back, "Shorty.") He called me one day and, with little in the way of preliminaries, asked me whether I still wanted

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1. 347 U.S. 483 (1954).

a job in his chambers. I responded that I would love a job. "What's that?" he said, "you already have a job?" I tried, in every way I could, to correct his apparent misperception. I yelled, I shouted, I screamed that I did not have a job, that I wanted a job, that I would be honored to work for him. To all of which he responded: "Well, I don't know, if you already have a job . . . ." Finally, he took pity on me, assured me that he had been in jest, and confirmed that I would have a job in his chambers. He asked me, as I recall, only one further question: whether I thought I would enjoy working on dissents.

So went my introduction to Justice Marshall's (sometimes wicked) sense of humor. He took constant delight in baffling and confusing his clerks, often by saying the utterly ridiculous with an air of such sobriety that he half-convinced us of his sincerity. (There was the time, for example, when he announced sadly that he would have to recuse himself from *Gwaltney of Smithfield v. Chesapeake Bay Foundation*.[2] When we pressed him for a reason, he hemmed and hawed for many minutes, only finally to say: "Because I l-o-o-o-o-v-e their ham." When we laughed, he assumed an attitude of great indignation and began instructing us on proper recusal policy. It was early in the Term; perhaps we may be forgiven for thinking for a moment that, after all, this was not a joke.) He had an endless supply of jokes, not all of them, I must admit, appropriate to print in the pages of a law review. And he was the greatest comic storyteller I have ever heard, or ever expect to hear. This talent, I think, may be impossible to communicate to those never exposed to it. It was a matter of timing (the drawn-out lead-up, the pregnant pause), of vocal intonations and inflections, and most of all of facial expressions (the raised brow, the sparkling eyes, the sidelong glance). Suffice it to say that at least once in the course of every meeting we had with him (and those were frequent), my co-clerks and I would find ourselves holding our sides and gasping for breath, as we struggled to regain our composure.

Thinking back, I'm not sure why we laughed so hard—or rather, I'm not sure why Justice Marshall told his stories so as to make us laugh—because most of the stories really weren't funny. To be sure, some were pure camp. (When Justice Marshall was investigating racial discrimination in the military in Korea, a soldier demanded that he provide a password; the hulking (and, of course, black) Marshall looked down at the soldier and asked, "Do you really think I'm North Korean?" And when assisting in the drafting of the Kenyan Constitution, the Justice was introduced to Prince Philip. "Do you care to hear my opinion of lawyers?" Prince Philip asked in posh British tones, mimicked to great comic effect by Justice Marshall. "Only," Justice Marshall replied—before the two discov-

2. 484 U.S. 49 (1987).

ered mutual ground in a taste for bourbon—"if you care to hear my opinion of princes.") But most of the stories, if told by someone else, would have expressed only sorrow and grimness. They were stories of growing up black in segregated Baltimore, subject to daily humiliation and abuse. They were stories of representing African-American defendants in criminal cases—often capital cases—in which a fair trial was not to be hoped for, let alone expected. (He knew he had an innocent client, Justice Marshall said, when the jury returned a sentence of life imprisonment, rather than execution.) They were stories of the physical danger (the lynch mobs, the bomb-throwers, the police themselves) that the Justice frequently encountered as he traversed the South battling state-imposed segregation. They were stories of prejudice, violence, hatred, fear; only as told by Justice Marshall could they ever have become stories of humor and transcending humanity.

The stories were something more than diversions (though, of course, they were that too). They were a way of showing us that, bright young legal whipper-snappers though we were, we did not know everything; indeed, we knew, when it came to matters of real importance, nothing. They were a way of showing us foreign experiences and worlds, and in doing so, of reorienting our perspectives on even what had seemed most familiar. And they served another function as well: they reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories—stories of people's lives as shaped by law, stories of people's lives as might be changed by law. Justice Marshall had little use for law as abstraction, divorced from social reality (he muttered under his breath for days about Judge Bork's remark that he wished to serve on the Court because the experience would be "an intellectual feast"); his stories kept us focused on law as a source of human well-being.

That this focus made the Justice no less a "lawyer's lawyer" should be obvious; indeed, I think, quite the opposite. I knew, of course, before I became his clerk that Justice Marshall had been the most important—and probably the greatest—lawyer of the twentieth century. I knew that he had shaped the strategy that led to *Brown v. Board of Education* and other landmark civil rights cases; that he had achieved great renown (indeed, legendary status) as a trial lawyer; that he had won twenty-nine of the thirty-two cases he argued before the Supreme Court. But in my year of clerking, I think I saw what had made him great. Even at the age of eighty, his mind was active and acute, and he was an almost instant study. Above all, though, he had the great lawyer's talent (a talent many judges do not possess) for pinpointing a case's critical fact or core issue. That trait, I think, resulted from his understanding of the pragmatic—of the way in which law worked in practice as well as on the books, of the way in

which law acted on people's lives. If a clerk wished for a year of spinning ever more refined (and ever less plausible) law-school hypotheticals, she might wish for a clerkship other than Justice Marshall's. If she thought it more important for a Justice to understand what was truly going on in a case and to respond to those realities, she belonged in Justice Marshall's chambers.

None of this meant that notions of equity governed Justice Marshall's vote in every case; indeed, he could become quite the formalist at times. During the Term I clerked, the Court heard argument in *Torres v. Oakland Scavenger Co.*[3] There, a number of Hispanic employees had brought suit alleging employment discrimination. The district court dismissed the suit, and the employees' lawyer filed a notice of appeal. The lawyer's secretary, however, inadvertently omitted the name of one plaintiff from the notice. The question for the Court was whether the appellate court had jurisdiction over the party whose name had been omitted; on this question rode the continued existence of the employee's discrimination claim. My co-clerks and I pleaded with Justice Marshall to vote (as Justice Brennan eventually did) that the appellate court could exercise jurisdiction. Justice Marshall refused. As always when he disagreed with us, he pointed to the framed judicial commission hanging on his office wall and asked whose name was on it. (Whenever we told Justice Marshall that he "had to" do something—join an opinion, say—the Justice would look at us coldly and announce: "There are only two things I *have to* do—stay black and die." A smarter group of clerks might have learned to avoid this unfortunate grammatical construction.) The Justice referred in our conversation to his own years of trying civil rights claims. All you could hope for, he remarked, was that a court didn't rule against you for illegitimate reasons; you couldn't hope, and you had no right to expect, that a court would bend the rules in your favor. Indeed, the Justice continued, it was the very existence of rules—along with the judiciary's felt obligation to adhere to them—that best protected unpopular parties. Contrary to some conservative critiques, Justice Marshall believed devoutly—believed in a near-mystical sense—in the rule of law. He had no trouble writing the *Torres* opinion.

Always, though, Justice Marshall believed that one kind of law—the Constitution—was special, and that the courts must interpret it in a special manner. Here, more than anywhere else, Justice Marshall allowed his personal experiences, and the knowledge of suffering and deprivation gained from those experiences, to guide him. Justice Marshall used to tell of a black railroad porter who noted that he had been in every state and every city in the country, but that he had never been anyplace where he had to

3. 487 U.S. 312 (1988).

put his hand in front of his face to know that he was black. Justice Marshall's deepest commitment was to ensuring that the Constitution fulfilled its promise of eradicating such entrenched inequalities—not only for African-Americans, but for all Americans alike.

The case I think Justice Marshall cared about most during the Term I clerked for him was *Kadrmas v. Dickinson Public Schools*.[4] The question in *Kadrmas* was whether a school district had violated the Equal Protection Clause by imposing a fee for school bus service and then refusing to waive the fee for an indigent child who lived sixteen miles from the nearest school. I remember, in our initial discussion of the case, opining to Justice Marshall that it would be difficult to find in favor of the child, Sarita Kadrmas, under equal protection law. After all, I said, indigency was not a suspect class; education was not a fundamental right; thus, a rational basis test should apply, and the school district had a rational basis for the contested action. Justice Marshall (I must digress here) didn't always call me "Shorty"; when I said or did something particularly foolish, he called me (as, I hasten to add, he called all his clerks in such situations) "Knucklehead." The day I first spoke to him about *Kadrmas* was definitely a "Knucklehead" day. (As I recall, my handling of *Kadrmas* earned me that appellation several more times, as Justice Marshall returned to me successive drafts of the dissenting opinion for failing to express—or for failing to express in a properly pungent tone—his understanding of the case.) To Justice Marshall, the notion that government would act so as to deprive poor children of an education—of "an opportunity to improve their status and better their lives"[5]—was anathema. And the notion that the Court would allow such action was even more so; to do this would be to abdicate the judiciary's most important responsibility and its most precious function.

For in Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government—to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission. (Indeed, I think if Justice Marshall had had his way, cases like *Kadrmas* would have been the only cases the Supreme Court heard. He once came back from conference and told us sadly that the other Justices had rejected his proposal for a new Supreme Court rule. "What was the rule, Judge?" we asked. "When one corporate fat cat sues another corporate fat cat," he replied, "this Court shall have no juris-

4. 487 U.S. 450 (1988).

5. *Id.* at 468-69 (Marshall, J., dissenting).

diction.") The nine Justices sat, to put the matter baldly, to ensure that Sarita Kadrmas could go to school each morning. At any rate, this was why they sat in Justice Marshall's vision of the Court and Constitution. And however much some recent Justices have sniped at that vision, it remains a thing of glory.

During the year that marked the bicentennial of the Constitution, Justice Marshall gave a characteristically candid speech. He declared that the Constitution, as originally drafted and conceived, was "defective"; only over the course of 200 years had the nation "attain[ed] the system of constitutional government, and its respect for . . . individual freedoms and human rights, we hold as fundamental today."[6] The Constitution today, the Justice continued, contains a great deal to be proud of. "[B]ut the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."[7] The credit, in other words, belongs to people like Justice Marshall. As the many thousands who waited on the Supreme Court steps well knew, our modern Constitution is his.

6. Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

7. *Id.* at 1341.

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Regulation of Hate Speech and Pornography After *R.A.V.*

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This Essay on the regulation of hate speech and pornography addresses both practicalities and principles. I take it as a given that we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation. I do not take it as a given that all governmental efforts to regulate such speech thus accord with the Constitution. What is more (and perhaps what is more important), the Supreme Court does not, and will not in the foreseeable future, take this latter proposition as a given either. If confirmation of this point were needed, it came last year in the shape of the Court's opinion in *R.A.V. v City of St. Paul*.[1] There, the Court struck down a so-called hate speech ordinance, in the process reiterating, in yet strengthened form, the tenet that the First Amendment presumptively prohibits the regulation of speech based upon its content, and especially upon its viewpoint. That decision demands a change in the nature of the debate on pornography and hate speech regulation. It does so for principled reasons—because it raises important and valid questions about which approaches to the regulation of hate speech and pornography properly should succeed in the courts. And it does so for purely pragmatic reasons—because it makes clear that certain approaches almost surely will not succeed.

In making this claim, I do not mean to suggest that all efforts to regulate pornography and hate speech be suspended, on the

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[1] 112 S Ct 2538 (1992).

ground either of mistake or of futility. Quite the opposite. *R.A.V.* largely forecloses some lines of advocacy and argument (until now the dominant lines), as well perhaps it should have. But the decision leaves open alternative means of regulating some pornography and hate speech, or of alleviating the harms that such speech causes. The primary purpose of this Essay is to offer some of these potential new approaches for consideration and debate. The question I pose is whether there are ways to achieve at least some of the goals of the anti-pornography and anti-hate speech movements without encroaching on valuable and ever more firmly settled First Amendment principles. This Essay is just that—an essay, a series of trial balloons, which may be shot down, from either side or no side at all, by me or by others. The point throughout is to emphasize the range of approaches remaining available after *R.A.V.* and meriting discussion.

I. The Problem of Viewpoint Discrimination

In *R.A.V.*, the Court struck down a local ordinance construed to prohibit those fighting words, but only those fighting words, based on race, color, creed, religion, or gender.[2] Fighting words long have been considered unprotected expression—so valueless and so harmful that government may prohibit them entirely without abridging the First Amendment.[3] Why, then, was the ordinance before the Court constitutionally invalid? The majority reasoned that the ordinance's fatal flaw lay in its incorporation of a kind of content-based distinction. The ordinance, on its very face, distinguished among fighting words on the basis of their subject matter: only fighting words concerning "race, color, creed, religion or gender" were forbidden.[4] More, and much more nefariously in the Court's view, the ordinance in practice discriminated between different viewpoints: it effectively prohibited racist and sexist fighting words, while allowing all others.[5] Antipathy to such viewpoint distinctions, the Court stated, lies at the heart of the guarantee of freedom of expression. "The government may not regulate [speech] based on hostility—or favoritism—towards the underlying

[2] Id at 2542. The Supreme Court defined "fighting words" in *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942), as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

[3] *Chaplinsky*, 315 US at 572.

[4] *R.A.V.*, 112 S Ct at 2541, 2547.

[5] Id at 2547-48.

message expressed"; it may not suppress or handicap "particular ideas."[6]

The reasoning in *R.A.V.* closely resembles that found in the key judicial decision on the regulation of pornography. In *American Booksellers Ass'n, Inc. v Hudnut*,[7] affirmed summarily by the Supreme Court, the United States Court of Appeals for the Seventh Circuit invalidated the Indianapolis anti-pornography ordinance drafted by Andrea Dworkin and Catharine MacKinnon. That ordinance declared pornography a form of sex discrimination, with pornography defined as "the graphic sexually explicit subordination of women, whether in pictures or in words," that depicted women in specified sexually subservient postures.[8] The core problem for the Seventh Circuit, as for the Supreme Court in *R.A.V.*, was one of viewpoint discrimination. The ordinance, according to the Court of Appeals, made the legality of expression "depend[ent] on the perspective the author adopts."[9] Sexually explicit speech portraying women as equal was lawful; sexually explicit speech portraying women as subordinate was not. The ordinance, in other words, "establishe[d] an 'approved' view" of women and of sexual relations.[10] From this feature, invalidation necessarily followed: "The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents."[11]

The approach used in *R.A.V.* and *Hudnut* has a large body of case law behind it. The presumption against viewpoint discrimination did not emerge alongside of, or in response to, the effort to curtail certain forms of racist and sexist expression. Rather, that presumption long has occupied a central position in First Amendment doctrine. Decades ago, for example, the Supreme Court employed the presumption to strike down laws restricting expression that discredited the military or that presented adultery in a favorable light, and more recently, the Court invoked the presumption to invalidate flag-burning statutes.[12] This is not to say that the Court invariably has invalidated laws that incorporate view-

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[6] Id at 2545, 2549.

[7] 771 F2d 323 (7th Cir 1985), aff'd mem, 475 US 1001 (1986).

[8] Id at 324.

[9] Id at 328.

[10] Id.

[11] Id at 325.

[12] See *Schacht v United States*, 398 US 58, 67 (1970) (military); *Kingsley Int'l Pictures Corp. v Regents*, 360 US 684, 688 (1959) (adultery); *Texas v Johnson*, 491 US 397, 416-17 (1989) (flag-burning); *United States v Eichman*, 496 US 310, 317-18 (1990) (same).

point favoritism. Exceptions to the rule exist, although the Court rarely has seen fit to acknowledge them as such; in a number of areas of First Amendment law (and especially when so-called low-value speech is implicated), the Court breezily has ignored both more and less obvious forms of viewpoint preference.[13] Still, the rule has been more often honored than honored in the breach, and the Supreme Court's opinion in *R.A.V.*, as well as its summary affirmance of *Hudnut*, could have been expected.

Moreover, the Court's decision in *R.A.V.* entrenched still further the presumption against viewpoint-based regulation of speech. To be sure, the majority opinion received only five votes and came under vehement attack from the remaining Justices.[14] Thus, some might reason that the disposition of the case reveals a weakening in the Court's commitment to viewpoint neutrality, either across the board or with respect to racist and sexist expression. If this reasoning were valid, those disliking *R.A.V.* might simply wait and pray for an advantageous change in the Court's membership. But any such reading of the case rests on a grave misunderstanding. The Court's opinion received the support of only a bare majority because, for two reasons having nothing to do with the particular viewpoint involved, the case appeared to some Justices not to invoke the presumption against viewpoint regulation at all. First,

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[13] Several examples of this blindness to viewpoint discrimination occur in the area of commercial speech. See *Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico*, 478 US 328, 330-31 (1986) (upholding a law prohibiting advertising of casino gambling, but leaving untouched all speech discouraging such gambling); *Central Hudson Gas & Electric v Public Service Commission*, 447 US 557, 569-71 (1980) (striking down a broad law prohibiting advertising to stimulate the use of electricity, but suggesting that a more narrowly-tailored law along the same lines would meet constitutional standards, even if the law were to allow all expression discouraging use of electricity). In addition, as Catharine MacKinnon has noted, the delineation of entire low-value categories of speech, such as obscenity and child pornography, may be thought to reflect a kind of viewpoint discrimination, given that the speech falling within such categories likely expresses a single (disfavored) viewpoint about sexual matters. See Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 212 (Harvard, 1987). Further discussion of this point, and its relevance for the regulation of pornography and hate speech, appears in note 73 and the text accompanying note 80. Finally, the Court has indicated that the usual presumption against viewpoint discrimination does not apply, or at least does not apply in full force, when the government engages in selective funding of speech, rather than selective restriction of speech. See *Rust v Sullivan*, 111 S Ct 1759, 1772-73 (1991); text accompanying notes 28-29.

[14] The four Justices who refused to join the Court's opinion also voted to invalidate the St. Paul ordinance, but only because of a concern about overbreadth that easily could have been corrected. They assailed the majority's conclusion that the presumption against viewpoint discrimination mandated invalidation of the statute, either on the view that the presumption failed to operate in spheres of unprotected speech, see 112 S Ct at 2551-54 (White concurring) and id at 2560 (Blackmun concurring), or on the view that the ordinance incorporated no viewpoint-based distinction, see id at 2570-71 (Stevens concurring).

and most important, the alleged viewpoint discrimination in the case occurred within a category of speech—fighting words—that the Court long ago declared constitutionally unprotected. Second, the viewpoint discrimination found in the ordinance existed not on its face, but only in application—and even in application, only with a fair bit of argument.[15] Had the law distinguished on its face between racist (or sexist) speech and other speech outside the category of fighting words, the Court's decision likely would have been unanimous.[16] What *R.A.V.* shows, then, is the depth, not the tenuousness, of the Court's commitment to a viewpoint neutrality principle. And what *R.A.V.* did, in applying that principle to a case of non-facial discrimination in an unprotected sphere, was to render that principle even stronger.

Any attempt to regulate pornography or hate speech—or at least any attempt standing a chance of success—must take into account these facts (the "is," regardless whether the "ought") of First Amendment doctrine. A law specifically disfavoring racist or sexist speech (or, to use another construction, a law distinguishing between depictions of group members as equal and depictions of group members as subordinate) runs headlong into the longstanding, and newly revivified, principle of viewpoint neutrality. I do not claim that exceptions to this principle will never be made, or even that such exceptions will not be made by the current Court. Exceptions, as noted previously, have been recognized before (even if not explicitly); they doubtless will be recognized again; and in the last section of this Essay, I consider briefly whether and how to frame them. I do claim that given the current strength of the viewpoint neutrality principle, a purely pragmatic approach to regulating hate speech and pornography would seek to use laws not subject to the viewpoint discrimination objection, while also seeking to justify—*as exceptions*—carefully crafted and limited departures from the rule against viewpoint regulation.

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[15] The St. Paul ordinance, on its face, discriminated only on the basis of subject matter, as the Court conceded. For the dispute on whether the ordinance applied in a viewpoint-discriminatory manner, contrast the majority opinion, 112 S Ct at 2547-48, with the concurring opinion of Justice Stevens, id at 2570-71. Contrast also Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv L Rev 741, 762-63 & n 78 (1993) (*R.A.V.* ordinance not viewpoint-based in practice), with Elena Kagan, *The Changing Faces of First Amendment Neutrality*: R.A.V. v St. Paul, Rust v Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 S Ct Rev 29, 69-71 (*R.A.V.* ordinance viewpoint-based in practice).

[16] See note 14 for a description of the concurring Justices' objections to the Court's decision. In the case hypothesized in the text, those objections would have evaporated.

This approach, in my view, also best accords with important free speech principles (the "ought" in the "is" of First Amendment doctrine). A focus on the feasible is arguably irresponsible if the feasible falls desperately short of the proper. But here, I think, that is not the case. If reality—the current state of First Amendment doctrine—counsels certain proposals and not others, certain lines of argument and not others, so too do important values embodied in that doctrine. More specifically, the principle of viewpoint neutrality, which now stands as the primary barrier to certain modes of regulating pornography and hate speech, has at its core much good sense and reason. Although here I can do no more than touch on the issue, my view is that efforts to regulate pornography and hate speech not only will fail, but also should fail to the extent that they trivialize or subvert this principle.

Those who have criticized the courts for using the viewpoint neutrality principle against efforts to regulate pornography or hate speech usually have offered one of two arguments. First, some have claimed that such efforts comport with the norm of viewpoint neutrality because they are based on the harm the speech causes, rather than the viewpoint it espouses.[17] Second, and more dramatically, some have challenged the norm itself as incoherent, worthless, or dangerous.[18] Both lines of argument have enriched discussion of the viewpoint neutrality principle, by challenging the tendency of such discussion to do nothing more than apotheosize. Yet both approaches, in somewhat different ways, slight the reasons and values underlying current First Amendment doctrine—including the decisions in *R.A.V.* and *Hudnut*.

The claim that pornography and hate-speech regulation is harm-based, rather than viewpoint-based, has an initial appeal, but turns out to raise many hard questions. The claim appeals precisely because it reflects an understanding of the value of a view-

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[17] See, for example, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589, 612; MacKinnon, *Feminism Unmodified* at 212 (cited in note 13). See also *R.A.V.*, 112 S Ct at 2570 (Stevens concurring). Professor Sunstein always has combined this argument with a fuller analysis of when exceptions to the viewpoint regulation doctrine are justified; for him, the ability to classify a law as harm-based seems not the end, but only the start of the inquiry. See Cass R. Sunstein, *Words, Conduct, Caste*, 60 U Chi L Rev 795, 796 (1993) (in this issue). My brief discussion, in Section II of this Essay, on whether and when to recognize such exceptions owes much to his work on the subject.

[18] See Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U Colo L Rev 975, 1044-47 (1993) (arguing that a viewpoint neutrality norm harms women and minority groups); MacKinnon, *Feminism Unmodified* at 210-13 (cited in note 13) (challenging the ability to identify viewpoint regulation except by reference to social consensus).

point neutrality norm and a desire to maintain it: if pornography and hate-speech regulation is harm-based, then we can have both it and a rule against viewpoint discrimination.[19] But the two yearnings may not be so easy to accommodate, for it is not clear that the classification proposed can support much weight. It is true that statutory language can focus either on the viewpoint of speech or on the injury it causes: contrast an ordinance that prohibits "sexually explicit materials approving the subordination of women" with an ordinance that prohibits "sexually explicit materials causing the subordination of women."[20] But if we assume (as a meaningful system of free speech must) that speech has effects—that the expression of a view will often cause people to act on it—then the two phrasings should be considered identical for First Amendment purposes. To grasp this point, consider here a few further examples. Contrast a law that prohibits criticism of the draft with a law that prohibits any speech that might cause persons to resist the draft.[21] Or, to use a case with more contemporary resonance, contrast an ordinance punishing abortion advocacy and counseling with an ordinance punishing any speech that might induce a woman to get an abortion. To sever these pairs of statutes would be to transform the First Amendment into a formal rule of legislative drafting, concerned only with appearance. In all these cases, the facially harm-based statute and the facially viewpoint-based statute function in the same way, because it is speech of a certain viewpoint, and only of that viewpoint, which causes the alleged injury. The facially harm-based statute in these circumstances will curtail expression of a particular message as surely as will the statute that refers to the message in explicit language. Given this functional identity, the statutes properly are viewed as cognates.[22]

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[19] I suspect that a wish of this kind explains Justice Stevens's insistence in *R.A.V.* that the St. Paul ordinance regulated speech "not on the basis of . . . the viewpoint expressed, but rather on the basis of the *harm* the speech causes." 112 S Ct at 2570 (Stevens concurring). Both in *R.A.V.* and in numerous other opinions and articles, Justice Stevens has expressed unwavering support for the presumption against viewpoint regulation. For the most recent example, see The Hon. John Paul Stevens, The *Freedom of Speech*, 102 Yale L J 1293, 1309 (1993).

[20] The example, in slightly different form, appears in Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 Harv J L & Pub Pol 461, 467 (1986). As Stone points out, the MacKinnon-Dworkin ordinance, as written, is at any rate closer to the law focusing on the viewpoint espoused than to the law focusing on the harm caused. Id.

[21] This example also appears in Stone. Id.

[22] An argument to the contrary might rely not on the effects of the statutes, but on the intent of the legislature in passing them. The claim here would be that the facially harm-based statute more likely springs from a legitimate governmental motive than does the facially viewpoint-based statute. But this claim seems dubious in any case in which the

This equivalence does not by itself destroy the claim that pornography regulation is harm-based, because both versions of the law might be characterized in this manner: so long as a legislature reasonably decides, as it surely could with respect to pornography, that speech causes harm, then regulation responding to that harm (however framed) might be considered neutral, rather than an effort to disfavor certain viewpoints. But this approach, too, makes any distinction between viewpoint-based regulation and harm-based regulation collapse upon itself. Using this analysis, almost all viewpoint-based regulation can be described as harm-based, responding neutrally not to ideas as such, but to their practical consequences. For it is difficult to see why anyone would opt to regulate a viewpoint that did not cause what seemed (to the regulators at least) to be a harm—or at a bare minimum, that could not reasonably be described as harmful. So, to return to the examples used above, a law prohibiting criticism of the draft could be termed harm-based given that such speech in fact produces draft resistance; or a law prohibiting abortion counseling and advocacy could be termed harm-based given that such speech in fact increases the incidence of abortion (which many would count a serious injury). The substitution of labels—"harm-based" for "viewpoint-based"—thus either allows most viewpoint regulation to go forward or leaves yet unanswered the central issue of precisely when such regulation is appropriate.

The more extreme critique of a case like *Hudnut*—that viewpoint discrimination doctrine is both incoherent and corrupt—is in many ways more difficult to counter. This critique rebels against the very core of First Amendment doctrine by accepting the government's power to suppress viewpoints as such whenever the viewpoints are thought to cause some requisite harm.[23] But the justification for this position includes at least one extremely potent point: that recognizing viewpoint regulation may well depend on the decisionmaker's viewpoint; more specifically, that a judicial

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statutes in fact operate in a similar manner. Because the legislators will know that the facially harm-based statute, like the facially viewpoint-based statute, will succeed in curtailing a specific message, their decision to phrase the statute in terms of harm (especially in light of a legal rule that effectively counsels them to do so) cannot provide a guarantee of legitimate intent.

[23] See MacKinnon, *Feminism Unmodified* at 212-13 (cited in note 13). Even under current First Amendment doctrine, the government may engage in viewpoint discrimination in emergency circumstances amounting to something like a clear and present danger. The critique discussed in the text would allow viewpoint regulation on a much less stringent showing.

decisionmaker will be least likely to recognize (or count as relevant) viewpoint regulation when the regulator's viewpoint lines up with his own.[24] This phenomenon may explain in part the willingness of courts to accept anti-obscenity laws at the same time as they strike down anti-pornography laws.[25] More generally, this epistemological problem may skew viewpoint discrimination doctrine, as it operates in practice, in favor of the status quo—resulting in the disproportionate approval of laws most reflective of traditional sentiment and the disproportionate invalidation of laws least so.

But even assuming this is true, I doubt that the appropriate response lies in undermining, let alone eliminating, the viewpoint discrimination principle. That principle grows out of two concerns, as meaningful today as ever in the past.[26] The first relates to the effects of viewpoint discrimination: such action skews public debate on an issue by restricting the ability of one side (and one side only) to communicate a message. The second relates to governmental purposes: viewpoint regulation often arises from hostility toward ideas as such, and this disapproval constitutes an illegitimate justification for governmental action. Of course, particular instances of viewpoint discrimination may spring from benign purposes and have benign effects. Legislators may engage in viewpoint discrimination in an effort not to suppress ideas, but to respond to real harms; and the resulting damage to public discourse may signify little when measured against the harms averted. But how are the courts, or the people, or even legislators themselves to make these determinations of motive and effect in any given case? Will it not always be true that a benign motive can be assigned to governmental action? Will not any judgment as to relative harms depend on an evaluation of the message affected? From these questions, relating to the difficulty of evaluating particular purposes and effects, emerges a kind of rule-utilitarian justification for the ban on viewpoint discrimination.

The historic examples of the dangers of viewpoint discrimination, on the counts of both purpose and effect, are well-known and legion: the government's attempts, especially during World War I, to stifle criticism of military activities; its attempts in the 1950s to

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[24] See id at 212; Becker, 64 U Colo L Rev at 1046-47 (cited in note 18).

[25] For discussion of the viewpoint bias inherent in obscenity laws, see notes 13 and 73 and text accompanying note 80.

[26] The classic discussion of the bases for viewpoint discrimination doctrine is Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189 (1983).

suppress support of Communism; its efforts, stretching over decades, to prevent the burning of American flags as a means of protesting the government and its policies.[27] And if all these seem remote either from current threats or from the kind of viewpoint regulation at issue in *Hudnut* and *R.A.V.*—if they seem the stories of another generation, with little relevance for today—consider instead the case of *Rust v Sullivan*,[28] previewed in earlier hypotheticals. There, the government favored anti-abortion speech over abortion advocacy, counseling, and referral, and the Court, to its discredit, announced that because the selectivity occurred in the context of a governmental funding program, the presumption against viewpoint discrimination was suspended.[29] Or instead consider the numerous ways in which some of the strange bedfellows of anti-pornography feminists (and one must admit their presence) might choose (indeed, have chosen) to attack the expression of, among others, gays and lesbians.

The key point here is only strengthened by the insight that viewpoint discrimination doctrine, as applied by the courts, has a way of producing some patterned inconsistencies; or to put this another way, the very critique of the Court's viewpoint discrimination doctrine exposes the need for a viewpoint neutrality principle. For what the critique highlights is the tendency of governmental actors (of all kinds) to see speech regulation through the lens of their own orthodoxies, as well as the ease with which such orthodoxies can thereby become entrenched. Recognition of this process lies at the very core of the viewpoint discrimination doctrine: as Justice Stevens recently has noted, that doctrine responds, preeminently, to fear of the "imposition of an official orthodoxy,"[30] even (or perhaps especially) as to matters involving sex or race. That judicial decisionmakers, in applying the doctrine, sometimes will succumb to the views they hold hardly argues in favor of granting carte blanche to legislative decisionmakers to bow to theirs. It is difficult to see how women and minorities, who have the most to lose from the establishment of political orthodoxy,

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[27] See Akhil Reed Amar, *The Supreme Court, 1991 Term—Comment: The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv L Rev 124 (1992), for a comparison of *R.A.V.* and the Court's most recent flag-burning cases, *Texas v Johnson*, 491 US 397 (1989), and *United States v Eichman*, 496 US 310 (1990).

[28] 111 S Ct 1759 (1991).

[29] Id at 1771-73. For a comparison of *Rust* and *R.A.V.*, see Kagan, 1992 S Ct Rev 29 (cited in note 15).

[30] Stevens, 102 Yale L J at 1304 (cited in note 19).

would gain by jettisoning the First Amendment doctrine that most protects against this prospect.

None of this discussion, of course, denies either the possibility or the desirability of crafting carefully circumscribed exceptions to First Amendment norms of viewpoint neutrality, and in the last section of this Essay, I briefly consider whether and how this task might be accomplished. Perhaps more important, none of this discussion gainsays the possibility of responding to the harms of pornography and hate speech through measures that do not contravene these norms. It is surely these measures, viewed from a pragmatic perspective, that stand the best chance of succeeding. And it usually will be these measures that pose the least danger to free speech principles. I turn, then, to a consideration of such proposals, less with the aim of making specific recommendations than with the aim of injecting new questions into the debate on hate speech and pornography regulation.

II. New Approaches

I canvass here four general approaches; each is capable of encompassing many specific proposals. The four approaches are, in order: (1) the enactment of new, or the stricter use of existing, bans on conduct; (2) the enactment of certain kinds of viewpoint-neutral speech restrictions; (3) the enhanced use of the constitutionally unprotected category of obscenity; and (4) the creation of carefully supported and limited exceptions to the general rule against viewpoint discrimination. The proposals I outline within these approaches are meant to be illustrative, rather than exhaustive. Many fall well within constitutional boundaries; others test (or, with respect to the fourth approach, directly challenge) the current parameters. The latter proposals raise hard questions relating to whether they (no less than the standard viewpoint-based regulation) too greatly subvert principles necessary to a system of free expression. I will touch on many of these questions, although I cannot give them the extended treatment they merit.

A. Conduct

The most obvious way to avoid First Amendment requirements is to regulate not speech, but conduct. Recently, some schol-

ars have sought to meld these two together.[31] Speech is conduct, they say, because speech has consequences (speech, that is, "does" something); or conduct is speech because conduct has roots in ideas (conduct, that is, "says" something). I use these terms in a different sense. When "conduct" becomes a synonym for "speech" (or "speech" for "conduct"), the command of the First Amendment becomes incoherent; depending on whether the paradigm of conduct or speech holds sway, government can regulate either almost everything or almost nothing. The speech/conduct line is hard to draw, but it retains much meaning in theory, and even more in practice. When I say "conduct," then, I mean acts that, in purpose and function, are not primarily expressive.[32] The government can regulate such acts without running afoul of the First Amendment.[33] Here, I discuss two specific kinds of conduct regulation: the continued enactment and use of hate crimes laws and the increased application of legal sanctions for acts commonly performed in the making of pornography.

The typical hate crimes law, as the Supreme Court unanimously ruled last Term, presents no First Amendment problem.[34] Hate crimes laws, as usually written, provide for the enhancement of criminal penalties when a specified crime (say, assault) is committed because of the target's race, religion, or other listed status.[35] These laws are best understood as targeting not speech, but acts—because they apply regardless whether the discriminatory conduct at issue expresses, or is meant to express, any sort of message. In this way, hate crimes laws function precisely as do other discrimination laws—for example, in the sphere of employment.[36]

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[31] See MacKinnon, *Feminism Unmodified* at 129-30, 193-94 (cited in note 13); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L J 431, 438-44.

[32] The approach, in focusing on expressive quality, is similar to the analysis that Cass Sunstein presents in these pages. See *Words, Conduct, Caste*, 60 U Chi L Rev at 807-09 (cited in note 17). See also Amar, 106 Harv L Rev at 133-39 (cited in note 27). Of course, as sketched here, the definition begs all kinds of questions about when acts, either in purpose or in function, are primarily expressive.

[33] So, for example, it goes without saying that the City of St. Paul could have proceeded against the juvenile offenders in *R.A.V.* through the law of trespass. See *R.A.V.*, 112 S Ct at 2541 n 1 (listing other statutes under which the offenders could have been punished).

[34] *Wisconsin v Mitchell*, 113 S Ct 2194 (1993).

[35] See, for example, Cal Penal Code § 422.7 (West 1988 & Supp 1993); NY Penal Law § 240.30(3) (McKinney Supp 1993); Or Rev Stat § 166.165(1)(a)(A) (1991); Wis Stat Ann § 939.645 (West Supp 1992).

[36] The Supreme Court in *Mitchell* noted the precise analogy between Title VII and the hate crimes statute at issue in the case. See 113 S Ct at 2200. It is noteworthy that both

When an employer fires an employee because she is black, the government may impose sanctions without constitutional qualm. This is so even when the discharge is accomplished (as almost all discharges are) through some form of expression, for whatever expression is involved is incidental both to the act accomplished and to the government's decision to prevent it.[37] The analysis ought not change when a person assaults another because she is black, once again even if the conduct (assault on the basis of race) is accompanied by expression. A penalty enhancement constitutionally may follow because it is pegged to an act—a racially-based form of disadvantage—that the state wishes to prevent, and has an interest in preventing, irrespective of any expressive component. In other words, in the assault case, no less than in the discharge case, the government decides to treat race-based acts differently from similar non–race-based acts; and in the assault case, no less than in the discharge case, this decision—a decision to prevent disproportionate harms from falling on members of a racial group—bears no relation to whether the race-based act communicates a message. Thus might end the constitutional analysis.

Perhaps, however, this argument is not quite so easy as I have made it out to be. It might be said, in response, that racially-based assaults, more often than racially-based discharges, are committed in order to make a statement. If this is true, a penalty enhancement not only will restrict more speech incidentally, but also may raise a concern that the government is acting for this very purpose. Or perhaps it might be said, more generally, that the use of a discriminatory motive to define an act, even supposing the act has no expressive component, at times may be highly relevant to First Amendment analysis: consider, for example, a penalty enhance-

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laws apply not only irrespective of whether the discrimination at issue expresses a message, but also irrespective of whether the discrimination is caused by particular beliefs. If, for example, discrimination laws prohibited discharges or assaults motivated by racial hatred—rather than simply based on race—they would pose a very different, and seemingly severe, First Amendment problem.

[37] Cass Sunstein makes this point in *Words, Conduct, Caste*, 60 U Chi L Rev at 827-28; his phrasing is that in such a case, the communication is merely evidence of, or a means of committing, an independently unlawful act. Professor Sunstein, however, appears to think that this analysis fails to cover hate crimes, because there the state's interest arises from the expressive nature of the conduct. As stated in the text, I do not believe this to be the case. A state has a legitimate interest in preventing, say, assaults on the basis of race, even when they are wholly devoid of expression. The interest is the same as the one in preventing discharges on the basis of race; it is an interest in eradicating racially-based forms of disadvantage generally, whether or not accompanied by communication of a message.

ment provision applicable to persons who obstruct voting on the basis of a voter's affiliation with the Republican Party.

But both of these objections seem to falter on further consideration of the nature of hate crimes regulation and the governmental interest in it. The voting obstruction law I have hypothesized (no less than a hate crimes law) applies to conduct regardless of whether it has expressive content, but the government's interest in the law always in a certain sense relates to expression: it is difficult to state, let alone give credence to, any interest the government could have, other than favoring or disfavoring points of view, for specially penalizing voting obstruction based on affiliation with a particular political party.[38] In the case of hate crimes laws, by contrast, the government not only is regulating acts irrespective of their expressive component, but also has a basis for doing so that is unrelated to suppressing (or preferring) particular views or expression—the interest, once again, in preventing conceded harms from falling inequitably on members of a particular racial group. In such a case, the regulation should be found to accord with First Amendment requirements, notwithstanding that it incidentally affects some expression. As the Court in *R.A.V.* noted, in referring to employment discrimination laws, "Where the government does not target conduct on the basis of its expressive content,"—and where, we might add, the government, in regulating conduct, has a credible interest that is unrelated to favoring or disfavoring certain ideas or expression—"acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[39]

In accord with this reasoning, communities should be able not only to impose enhanced criminal sanctions on the perpetrators of hate crimes, but also to provide special tort-based or other civil remedies for their victims. One of the accomplishments of the anti-pornography movement has been to highlight the benefits of using the civil, as well as the criminal, laws to deter and punish undesir-

[38] The hypothetical voting law might seem very different if enhanced penalties applied to obstruction based on the voter's affiliation with any political party, rather than with the Republican Party alone. In enacting this broader law, the state could have determined that it had an interest in protecting persons from suffering disproportionate harm as a result of their political views, analogous to the interest in protecting persons from suffering disproportionate harm as a result of their race. Under the analysis suggested in the text, this new voting law would meet constitutional standards because it applies regardless whether the conduct communicates a message and because the government now has a credible interest in the law not related to favoring or disfavoring particular viewpoints and messages.

[39] 112 S Ct at 2546-47.

able activity.[40] Civil actions involve fewer procedural safeguards for the defendant, including a much reduced standard of proof; as important, they may give greater control to the victim of the unlawful conduct than a criminal prosecution ever can do. Communities therefore should consider not merely the enactment of hate crimes laws, but also the provision of some kind of "hate torts" remedies. And in determining the scope of all such laws, communities should consider the manner in which the laws apply to crimes or civil violations committed on the basis of sex, which now often fall outside the compass of hate crimes statutes.

To address the harms arising from pornography, the government has numerous available mechanisms that regulate not speech, but conduct. At an absolute minimum, states can prosecute actively, under generally applicable criminal laws, the sexual assaults and other violent acts so frequently committed against women in the making of pornography. Similarly, as Judge Easterbrook suggested in *Hudnut*, states may specifically make illegal (if they have not already) the use of fraud, trickery, or force to induce people to perform in any films, without regard to viewpoint.[41] Extensive regulation of such practices is the lot of many industries; the visual media surely are not entitled to any special exemption. With respect to regulatory effects of this kind too, responses based on the criminal law can be supplemented by enhanced tort remedies.[42]

A much more questionable means of deterring the production of pornographic works would be to press into service laws regulating prostitution, pimping, or pandering. In one recent case, an Arizona court upheld, against First Amendment challenge, the use of prostitution and pandering statutes against a woman who managed and performed in a sex show.[43] The court reasoned, consistent with established First Amendment doctrine, that the prosecutions were

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[40] See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv CR-CL L Rev 1, 29 n 52 (1985).

[41] 771 F2d at 332.

[42] For a discussion of whether the government, in addition to banning the conduct itself, may prohibit the dissemination of speech produced by means of this unlawful conduct, see text accompanying notes 55-61.

[43] *Arizona v Taylor*, 167 Ariz 429, 808 P2d 314, 315-16 (1990). The state's prostitution statute prohibited "engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person." Id. The use of statutes of this kind against women who merely perform in pornography raises a special concern: such prosecutions make a criminal of the very victim of exploitative practices. Moreover, these prosecutions may have little value: they are likely to deter the production of pornography far less well than prosecuting the actual pornographer under pimping, pandering, or other similar statutes, which essentially prohibit the hiring of persons to engage in sexual practices.

permissible because even if the show had expressive content, the state had acted under statutes directed at conduct in order to further interests unrelated to the suppression of expression.[44] The same argument could be made whenever the government acts against a pornographer under a sufficiently broad pimping or pandering statute, so long as the prosecution were based on a significant interest unrelated to speech, such as the prevention of sexual exploitation. The problem with this analysis lies in its potential scope: many films that no one would deem pornographic contain sexual conduct by hired actors and thus fall within the very same statutes. Notwithstanding all I have said above, even the neutral application of a law that is not itself about speech might in some circumstances violate the First Amendment. (Consider, to use an extreme example, an environmental law imposing a ban on cutting down trees, as applied to producers of books and newspapers.) In all probability, the use of pimping and pandering statutes in the way I have just considered suffers from this constitutional defect, given the potential for applying such statutes to large amounts of speech at the core of constitutional protection.

Those favoring the direct regulation of pornography often charge that relying exclusively on bans on conduct—most notably, a ban on coerced performances—would allow abuses currently committed in the manufacture of pornography to continue.[45] Such approaches, even if determinedly enforced, certainly will have less effect than banning pornography altogether. But once again, the most sweeping strategies also will be the ones most subject to constitutional challenge and the ones most subversive of free speech principles. An increased emphasis on conduct, rather than speech, provides a realistic, principled, and perhaps surprisingly effective alternative.

B. Viewpoint-Neutral Restrictions

The Supreme Court often has said that any speech restriction based on content, even if not based on viewpoint, presumptively violates the First Amendment.[46] But rhetoric in this instance is

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[44] Id at 317. The key case supporting this analysis is *United States v O'Brien*, 391 US 367 (1968), in which the Court approved the use of a statute prohibiting any knowing destruction of a Registration Certificate, purportedly enacted to further the efficient operation of the draft, against a person who had burned his draft card as part of a political protest.

[45] See, for example, Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum L Rev 1, 23-24 (1992).

[46] See, for example, *Police Department of Chicago v Mosley*, 408 US 92, 95-96 (1972); *Simon & Schuster, Inc. v Members of the New York State Crime Victims Board*, 112 S Ct

semi-detached from reality. The Court, for example, sometimes has upheld regulations based on the subject matter of speech.[47] And the Court in several cases has approved restrictions on non-obscene but sexually explicit or scatological speech.[48] Cases of this kind raise the possibility of eradicating the worst of hate speech and pornography through statutes that, although based on content, on their face (and, to the extent possible, as applied) have no viewpoint bias.

One potential course is to enact legislation, or use existing legislation, prohibiting carefully defined kinds of harassment, threats, or intimidation, including but not limited to those based on race and sex. For example, in considering the St. Paul ordinance, the Court in *R.A.V.* noted that the city could have achieved "precisely the same beneficial effect" through "[a]n ordinance not limited to the favored topics"[49]—that is, through an ordinance prohibiting all fighting words, regardless whether based on race, sex, or other specified category. An ordinance of this kind would have presented no constitutional issue at all given the Court's prior holdings that fighting words are a form of unprotected expression.[50] A law prohibiting, in viewpoint-neutral terms, not merely fighting words but other kinds of harassment and intimidation would (and should) face greater constitutional difficulties, relating most notably to overbreadth and vagueness; but a carefully drafted statute might well surmount these hurdles, and such a law surely would not be subject to the selectivity analysis of *R.A.V.* Viewpoint-neutral laws of this kind—whether framed in terms of fighting words

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501, 508-09 (1991); *Consolidated Edison Co. of New York v Public Service Commission of New York*, 447 US 530, 536 (1980).

[47] See, for example, *Burson v Freeman*, 112 S Ct 1846 (1992); *Greer v Spock*, 424 US 828 (1976); *CBS v Democratic National Committee*, 412 US 94 (1973). See generally Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U Chi L Rev 81 (1978). *R.A.V.* might be thought to treat subject matter restrictions with the same distrust shown to viewpoint restrictions: the technical holding of the Court was that the St. Paul ordinance facially violated the Constitution "in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 112 S Ct at 2542. But elsewhere in the opinion, the Court made clear that its true concern related to viewpoint bias. What most bothered the Court was that the subject matter restriction operated in practice to restrict speech of only particular (racist, sexist, etc.) views. See, for example, id at 2547-49.

[48] See *FCC v Pacifica Foundation*, 438 US 726 (1978) (indecent radio broadcast); *Young v American Mini-Theatres*, 427 US 50 (1976) ("adult" theaters); *City of Renton v Playtime Theatres, Inc.*, 475 US 41 (1986) (same).

[49] 112 S Ct at 2550.

[50] See *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942). Of course, the application of the ordinance to any particular expression might well raise serious constitutional issues relating to the permissible scope of the fighting words category.

or in some other manner—might be especially appropriate in communities (such as, perhaps, educational institutions) whose very purposes require the maintenance of a modicum of decency.[51]

Another approach, relevant particularly to pornography, could focus on regulating materials defined in terms of sexual violence. At first glance, *R.A.V.* and (especially) *Hudnut* seem to doom such efforts, but this initial appearance may be deceptive. The problem in *Hudnut* involved the way the ordinance under review distinguished between materials presenting women as sexual equals and materials presenting women as sexual subordinates: two works, both equally graphic, would receive different treatment because of different viewpoints.[52] This problem, the court suggested, would not arise if a statute instead were to classify materials according to their sexual explicitness.[53] Indeed, the Supreme Court already has said as much by treating as non-viewpoint-based (and sometimes upholding) regulations directed at even non-obscene sexually graphic materials.[54] If a regulation applying to sexually explicit materials does not raise concerns of viewpoint bias, perhaps neither does a regulation applying to works that are both sexually explicit and sexually violent.

One counterargument might run that the reference to sexual violence in this hypothetical statute would function simply as a code word for a disfavored viewpoint: sexually violent materials present women as subordinates; sexually non-violent materials present women as equals; hence, the law replicates in covert language the faults of the MacKinnon-Dworkin ordinance. But this response strikes me as flawed, because many non-violent works present women as sexual subordinates, and some violent materials may not (violence is not *necessarily* a synonym for non-equality). The question is by no means free from doubt—much depends on how far the Court will or should go to find viewpoint discrimination in a facially neutral statute—but framing a statute along these lines seems worth consideration.

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[51] See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm & Mary L Rev 267, 317-25 (1991), for a general discussion of the compatibility of speech regulation with the objectives of higher education.

[52] See 771 F2d at 328.

[53] Id at 332-33.

[54] See note 48 and accompanying text. The Court has failed to indicate precisely when regulations of this kind, even assuming they are not viewpoint-based, will meet constitutional standards. All of the regulations upheld by the Court have involved not complete bans, but more limited restrictions. A law foreclosing such speech entirely would raise constitutional concerns of greater dimension.

Finally, and once again of particular relevance to pornography, the Constitution may well permit direct regulation of speech, if phrased in a viewpoint-neutral manner, when the regulation responds to a non-speech related interest in controlling conduct involved in the materials' manufacture. Assume here, as discussed above, that the government has a strong interest in regulating the violence and coercion that often occurs in the making of pornography.[55] Does it then follow that the government may punish the distribution of materials made in this way as well as the underlying unlawful conduct? The Supreme Court's decision in *New York v Ferber*[56] suggests an affirmative answer. In *Ferber*, the Court sustained a statute prohibiting the distribution of any material depicting a sexual performance by a child, primarily on the ground that the law arose from the government's interest in preventing the conduct (sexual exploitation of children) necessarily involved in making the expression. Similarly, it would appear, the government may prohibit directly the dissemination of any materials whose manufacture involved coercion of, or violence against, participants. The *Hudnut* Court specifically indicated that such a statute would meet constitutional requirements.[57]

Important questions remain unanswered with respect to this approach, for there are almost surely limits on the principle that the government may engage in viewpoint-neutral regulation of speech whenever it has an interest in deterring conduct involved in producing the expression. The principle itself, in addition to explaining *Ferber*, may explain such disparate outcomes as the ability of a court to enjoin the publication of stolen trade secrets and to award damages for the unapproved publication of copyrighted material.[58] But some hypothetical applications of the principle suggest the need for a boundary line. For example, could the government prohibit all speech whose manufacture involved violations of the Fair Labor Standards Act? Surely such a statute would violate the Constitution. Or, to use another sort of case, could the government prohibit the distribution of all national security information stolen from government agencies? An affirmative answer would require overruling the *Pentagon Papers* case.[59] The question arises,

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[55] See text accompanying notes 41-42.

[56] 458 US 747 (1982).

[57] See 771 F2d at 332-33.

[58] See *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 US 539 (1985).

[59] See *New York Times Co. v United States*, 403 US 713 (1971). I thank Geof Stone for suggesting this example.

then, how to separate permissible from impermissible applications of the principle. I am not sure that any factor, or even set of factors, can serve to explain fully all the cases mentioned. Some relevant considerations, however, might include the value of the speech at issue, the magnitude of the harm involved in producing the speech, the extent to which prohibiting the speech is necessary to prevent the harm from occurring, and the extent to which the expression itself reinforces or deepens the initial injury.[60] With respect to all of these considerations, the prohibition of materials whose manufacture involves sexual violence seems similar enough to the ban in *Ferber* to suggest that the regulation, while deterring the worst forms of pornography, still would satisfy First Amendment standards.[61]

C. Obscenity

The government can also regulate sexually graphic materials harmful to women by using the long-established category of obscenity. This approach to regulating such materials has come to assume the aspect of heresy in the ranks of anti-pornography feminism. Those who have argued for regulating pornography have stressed the differences, in rationale and coverage, between bans

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[60] The *Ferber* Court viewed the harm involved in manufacturing child pornography as great and the value of the resulting expression as usually, though not always, slight. See 458 US at 757-58, 762-63, 773-74. With respect to the necessity of prohibiting not merely the unlawful conduct, but also the speech itself, the *Ferber* Court stated that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." Id at 759. Finally, the *Ferber* Court noted that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." Id.

[61] The Supreme Court's decision in *City of Renton v Playtime Theatres*, 475 US 41 (1986), might be taken to suggest—although, I believe, wrongly—a further extension of the argument: that the government may prohibit the distribution of materials even substantially correlated to unlawful conduct in manufacture, so long as the definition of these materials is viewpoint-neutral. In *Renton*, the Court upheld the regulation of adult motion picture theaters on the ground that such theaters generally correlate with a rise in crime in the surrounding neighborhood. Id at 50. The Court declined to require a showing that any particular movie theater in fact produced these results. Similarly, a statute regulating a category of speech that is highly correlated with coercion of, or violence against, women might be thought to pass constitutional muster even if a particular instance of that speech did not involve coercion or violence. This line of argument, however, takes what I believe itself to be a problematic decision much too far. Crucial to the *Renton* holding was the limited scope of the regulation under review: it zoned adult theaters, but did not prohibit them. Id at 53. A total ban on speech, based on a mere correlation between the speech and unlawful conduct (even if the conduct, as in *Renton* and here, stemmed from something other than the speech's communicative effects), would raise constitutional concerns of much greater magnitude.

on the pornographic and bans on the obscene. It is said that obscenity law focuses on morality, while pornography regulation focuses on power.[62] It is said that offensiveness and prurience (two of the requirements for finding a work obscene) bear no relation to sexual exploitation.[63] It is said that taking a work "as a whole," as obscenity law requires, and exempting works of "serious value," as obscenity law does, ill-comports with the goal of preventing harm to women.[64] I do not think any of this is flatly wrong, but I do wonder whether these asserted points of difference—today, even if not in the past—suggest either the necessity or the desirability of spurning the obscenity category.

My doubts began in the midst of first teaching a course on free expression. In keeping with the prevailing view, I rigidly segregated the topics of obscenity and pornography. (If I recall correctly, I taught commercial speech in between the two.) In discussing each, I iterated and reiterated the distinctions between them, in much the terms I have just described. I think I made the points clearly enough, but my students resisted; indeed, they could hardly talk about the one topic separately from the other. In discussing obscenity, they returned repeatedly to the exploitation of women; in discussing pornography, of course, they dwelt on the same. Those who favored regulation of pornography also favored regulation of obscenity—at least as a second-best alternative. Those who disapproved regulation of pornography also disapproved regulation of obscenity. Perhaps it was a dense class or I a bad teacher, but I think not; rather, I think the class understood—or, at the very least, unwittingly revealed—something important.

Even when initially formulated, the current standard for identifying obscenity was justified in part by reference to real-world harms. To be sure, the Supreme Court, in its fullest statement of the rationale for establishing the category of obscenity, spoke of the need "to protect 'the social interest in . . . morality' " and, what is perhaps the same thing, of the need " 'to maintain a decent society . . . .' "[65] Here, the Court appeared to stress a version of morality divorced from tangible social consequences and related to simple sentiments of offense or disgust. But the Court also spoke

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[62] See MacKinnon, *Feminism Unmodified* at 147 (cited in note 13).

[63] See id at 174-75; Sunstein, 92 Colum L Rev at 20-21 (cited in note 45).

[64] See MacKinnon, *Feminism Unmodified* at 174-75 (cited in note 13).

[65] *Paris Adult Theatre I v Slaton*, 413 US 49, 59-60, 61 (1973) (emphasis deleted), quoting *Jacobellis v Ohio*, 378 US 184, 199 (1964) (Warren dissenting), and *Roth v United States*, 354 US 476, 485 (1957).

of—indeed, emphasized just as strongly—the "correlation between obscene material and crime" and, in particular, the correlation between obscene materials and "sex crimes."[66] This concern too may reflect a notion of morality, but if so, it is a morality rooted in material harms.[67] And although some of the specific harms then perceived might now appear dated—the Court was thinking as much of unlawful acts involving "deviance" as of unlawful acts involving violence—still the Court understood the obscenity category as emerging not merely from a body of free-floating values, but from a set of tangible harms, perhaps including sexual violence.[68]

Much more important is the way conceptions of obscenity have evolved since then, in part because of the anti-pornography movement itself, in part because of the deeper changes that movement reflects in public attitudes and morals. This shift in understanding, I think, accounted for my classroom experience. It is hard to test a proposition of this sort, but I will hazard it anyway: one of the great (if paradoxical) achievements of the anti-pornography movement has been to alter views on obscenity—to transform obscenity into a category of speech understood as intimately related, in part if not in whole, to harms against women.[69] Surely, such a change in perception should come as no great surprise. It would be the more astonishing by far if obscenity were viewed today as obscenity was viewed two decades ago, when the current constitutional standard was first announced. A doctrinal test does not so easily freeze public understandings, especially when the test in part relies (as the obscenity test does) on community standards and consciousness.[70] Views of obscenity, in other words, are not

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[66] 413 US at 58-59.

[67] See Daniel O. Conkle, *Harm, Morality, and Feminist Religion: Canada's New—But Not So New—Approach to Obscenity*, 10 Const Comm 105, 123-24 (1993), for discussion of these two kinds of morality (offense-based and harm-based) as reflected in obscenity doctrine.

[68] For this reason, I think Catharine MacKinnon's statement that obscenity is "ideational and abstract," rather than "concrete and substantive," represents something of an overstatement, even as applied to the initial understanding and formulation of the category. See MacKinnon, *Feminism Unmodified* at 175 (cited in note 13).

[69] One interesting proof (and product) of this reconceptualization is Senator Mitch McConnell's proposed legislation granting the victim of a sexual offense a right to claim damages from the distributor of any obscene work deemed to have contributed to the crime. Pornography Victims' Compensation Act of 1991, S 1521, 102d Cong, 1st Sess (Jul 22, 1991). Whatever the merits of this legislation, which raises serious concerns on numerous grounds, it clearly presupposes a link between obscenity and sexual violence.

[70] The obscenity standard asks whether the average person, applying contemporary community standards, would find a work prurient and offensive in its depiction of sexual

static, and they may have evolved in such a way as to link obscenity with harms to women.

Now it might be argued, in response to this claim, that so long as the formal test for determining obscenity remains the same, this reconceptualization of obscenity will avail women little, because the test's focus on prurience and offensiveness will prevent new understandings from affecting judicial outcomes. But this response seems to ignore the subtle and gradual ways law often develops. As prosecutors, juries, and judges increasingly adopt this new view of obscenity, enforcement practices and judicial verdicts naturally will come to resemble, although not to replicate, those that would obtain under an anti-pornography statute. There is in fact a substantial overlap between the categories of obscenity and pornography: most of the worst of pornography (materials with explicit and brutal sexual violence) meets the obscenity standard. As public perceptions continue to change, the application of the obscenity standard increasingly will focus on the materials causing greatest harm to women; nor need this development reflect any illegitimate acts of prosecutorial discretion.[71]

Moreover, this new focus may over time reshape, in a desirable manner, even the governing legal standard for determining obscenity. Doctrinal adjustments and reformulations of existing low-value categories of speech may well—and should—occur more readily than the creation of whole new categories, especially when the proposed new categories incorporate clear viewpoint bias. So, for example, the current obscenity test's requirement that materials be patently offensive may disintegrate in light of new understandings about the harms the obscenity category principally should address. This evolution of obscenity law recently has occurred in Canada, where the Supreme Court, responding to increased evidence and altered perceptions of harm to women, made sexual violence rather than sexual offensiveness the keystone of the obscenity category.[72] Efforts to redefine the obscenity category in this manner—a redefi-

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conduct. It also asks whether the work lacks serious literary, artistic, political, or scientific value. See *Miller v California*, 413 US 15, 24 (1973).

[71] If prosecutors determine to enforce obscenity laws only against materials with a certain viewpoint, the resulting actions would be no less problematic than the MacKinnon-Dworkin statute itself. But this result is hardly the only one that could be produced by changing public norms. For example, as noted earlier and discussed again below, a focus on sexual violence arguably is not viewpoint-biased. See text accompanying notes 52-54 and 74. Thus, to the extent that prosecutors enforce obscenity laws strictly against sexually violent materials that fall within the obscenity category, their acts would not violate the *R.A.V.* proscription of preferring some viewpoints to others within a low-value category.

[72] See *Regina v Butler and McCord*, [1992] 1 SCR 452, 134 NR 81, 108-18 (Canada).

nition that, consistent with much First Amendment theory, would tend to divorce speech restrictions from simple feelings of offense—should proceed in the United States as well.[73]

One measure along these lines that states or localities might attempt involves the special regulation of subcategories of obscenity that contain sexual violence. *R.A.V.* might seem to bar such an approach; it held, after all, that even within low-value categories of speech, such as obscenity or fighting words, the government may not make distinctions that pose a danger of viewpoint bias. I have argued above that a statute framed in terms of sexual violence may no more implicate this principle than the several statutes upheld by the Court framed in terms of sexual explicitness.[74] But even if courts reject this argument, another possibility presents itself. The Court in *R.A.V.* stated as an exception to its broad rule that a subcategory of unprotected speech can be specially regulated if it presents, in especially acute form, the concerns justifying the exclusion of the whole category from First Amendment protection.[75] It is hard to know what this exception means, especially in light of the Court's refusal to apply it to the category of race-based fighting words, which appears to pose in especially acute form the dangers giving rise to the entire fighting words category. It is no less difficult to determine what the exception *should* mean, given the ability to characterize in many different (and even conflicting) ways the concerns underlying any low-value category and the ease of restating those concerns with respect to any given subcategory. But given the Court's acknowledgment of the relationship between sexual crimes and obscenity, some consideration should be given to whether a statute focusing on the particular kinds of obscenity that most contribute to sexual violence would or should fall within the *R.A.V.* exception.[76]

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[73] It might be argued that such a redefinition of the obscenity category would render it viewpoint-based and therefore inconsistent with the First Amendment. This argument depends first on the proposition that a statute framed in terms of sexual violence is viewpoint-based, which I have discussed in the text accompanying notes 52-54. As important, the argument depends on the proposition that the obscenity category is not now viewpoint-based—in other words, that it does not now constitute some kind of exception to the rule of viewpoint neutrality. This proposition is difficult to maintain given the obscenity test's reliance on community standards of offensiveness. See Sunstein, 92 Colum L Rev at 28-29 (cited in note 45). As between an obscenity doctrine that focuses on sexual prurience and offensiveness and an obscenity doctrine that focuses on sexual prurience and violence, the former would appear to pose the greater danger of viewpoint bias.

[74] See text accompanying notes 52-54 and notes 71 and 73.

[75] 112 S Ct at 2545-46.

[76] The Court wrote, for example, that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of

The key point here is that regulation of obscenity may accomplish some, although not all, of the goals of the anti-pornography movement; and partly because of the long-established nature of the category, such regulation may give rise to fewer concerns of compromising First Amendment principles. Even for those who think that the obscenity doctrine is in some sense a second-best alternative, it represents the first-best hope of achieving certain objectives. And the obscenity doctrine itself may benefit by transformative efforts, as these efforts bring the doctrine into greater accord with the harm-based morality of today, rather than of twenty years ago.

D. Exceptions to Viewpoint Neutrality

The final approach I will discuss, although far more briefly than it deserves, involves crafting arguments to support explicit exceptions to the rule against viewpoint discrimination for pornography or hate speech. As noted earlier, exceptions to this rule do exist, but without any clear rationale; the Court, in upholding viewpoint discriminatory actions, simply has ignored their discriminatory nature. We know, from the decision in *R.A.V.* and the affirmance of *Hudnut*, that the Court will follow no such course of studied inattention with respect to pornography or hate speech: in both cases, the presence of viewpoint discrimination was considered—and was declared dispositive. The question, then, arises: Is it possible to make a convincing argument to the contrary? Is it possible, that is, to accept viewpoint neutrality as a general principle, but to support an exception to that principle either for pornography or for hate speech? The challenge here is to explain in credible fashion what makes one or two or three viewpoints (or one or two or three instances of viewpoint discrimination) different from all others—sufficiently different to support an exception and sufficiently different to ensure that the exception retains "exceptional" status. I cannot here provide the answer to that question. Instead, I will confine myself to some general observations about what considerations might be relevant to the inquiry.

Two factors necessary (but, I will argue, generally insufficient) for departing from the norm of viewpoint neutrality are (1) the

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commercial speech that justifies depriving it of full First Amendment protection) . . . is in its view greater there." Id at 2546. So too, it might be said, a State may choose to regulate in a special manner sexually violent obscenity because it poses a greater risk of contributing to sexual crimes—one of the characteristics of obscenity that justifies depriving it of full First Amendment protection.

seriousness of the harm the speech causes, and (2) the "fit" between the harm and the viewpoint discriminatory mechanism chosen to address it. The first consideration has an obvious basis: to the extent a viewpoint causes insignificant harm, the state's decision to suppress that viewpoint must rest not on legitimate reasons but on mere dislike of the idea at issue. The second consideration is related and not much more mysterious: when the government restricts a viewpoint, but the viewpoint is not coextensive with the harm allegedly justifying the governmental action, we may wonder (once again) whether the action is in fact motivated by simple distaste for the message. I have no doubt that a regulation of pornography and hate speech would satisfy the first inquiry, and little doubt that such a regulation could be carefully enough constructed to satisfy the second. Is that, however, sufficient?

I think not. Assume, for example, a carefully crafted regulation of abortion advocacy, counseling, or referral (the category of speech involved in *Rust v Sullivan*[77]), designed to reduce the incidence of abortions. Proponents of the regulation might urge that the law is precisely crafted to reduce the significant harms stemming from abortion; hence the law satisfies the two inquiries set forth above. I presume this outcome would strike many as irretrievably wrong. But, some opponents of the regulation might contend, the example fails to prove my larger point because the "harms" in the hypothetical case (however serious some might find them) are in fact widely contested and for that reason cannot form the basis of viewpoint regulation. These opponents might contrast a precisely crafted regulation of pro-smoking speech, designed to reduce the frequency of tobacco use. In that case, the harms are not contested; hence the regulation can go forward. The contrast here has much intuitive appeal, and I am not at all sure it has nothing to teach us. But this general line of reasoning makes the protections of the First Amendment weakest at the very point where views are the most unorthodox and unconventional. And even if I am wrong to think this result upside-down and unacceptable, another question would follow: Are not the harms caused by pornography and hate speech—characterized most generally as racial and sexual subordination—also very much contested? If they were not, the debate over hate speech and pornography might not have reached so intense a level.

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[77] 111 S Ct 1759, 1765 (1991).

Assuming, then, that harm and "fit" cannot alone justify viewpoint discrimination, perhaps the addition of low-value speech can do so. In other words, if legislators can make the case that speech leads to harm, if the speech regulated correlates precisely with that harm, and if the speech is itself low-value, then any viewpoint discrimination involved in the regulation becomes irrelevant.[78] At first glance, of course, *R.A.V.* definitively rejected this argument: the very holding of that case was that even within a low-value category of speech, viewpoint discrimination is generally prohibited. So, to use one of the Court's hypotheticals, the government may proscribe libel, but may not proscribe only libel attacking the government; or, to use something near the actual case, the government may prohibit fighting words, but may not prohibit only racist fighting words.[79] But what, then, are we to make of a category like obscenity—an entire low-value category (rather than a subdivision thereof) that seems to incorporate some viewpoint bias?[80] Could it possibly be the case that viewpoint discrimination built into the very definition of a low-value category is permissible, whereas viewpoint discrimination carving up a neutrally defined low-value category is not?

The proposition is perhaps less silly than it appears, for the latter, but not the former, lacks the precise "fit" that I above termed necessary for viewpoint regulation. When the Court establishes a low-value category, such as obscenity, it determines that the harms caused by the covered speech so outweigh its (minuscule) value that regulation of the speech, even if viewpoint discriminatory, will be permitted. The Court, in effect, predecides that regulation of the entire category will arise not from governmental hostility to the ideas restricted, but rather from a neutral decision based on harms and value; the viewpoint bias will occur as a mere byproduct of the fact that only the restricted ideas cause great harms and have sparse value. This predetermination insulates the government from a charge of viewpoint bias when the government regulates the entire category. But the establishment of a low-value category has no such effect when the government regulates within the category on the basis of a viewpoint extraneous to the cate-

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[78] I take Cass Sunstein to be making something like this argument in these pages. See 60 U Chi L Rev at 829 (cited in note 17).

[79] 112 S Ct at 2543 & n 4. The actual ordinance, as construed, prohibited race-based fighting words (discriminating by subject matter), but the Court argued that this restriction operated in practice in the same way as an ordinance banning racist fighting words (discriminating by viewpoint). See id at 2547–48.

[80] See notes 13 and 73.

gory's boundaries. In that case, there is reason to suspect that the government is acting not for the reasons already found by the Court to be legitimate, but rather out of hostility to a message. The critical failure in such a regulation relates to "fit": because the regulation is underinclusive—because it does not regulate all speech previously determined to cause great harm and have no value—the concern arises that the government has an illegitimate motive. Hence, to say, as the Court did in *R.A.V.*, that the government may not engage in unrelated viewpoint discrimination within a low-value category—may not, for example, ban only obscenity produced by Democrats—is not to say that viewpoint may not enter into the very definition of a low-value category. Once again, in the latter case viewpoint serves as a placeholder for a balance of harms and values found legitimate by the Court; in the former case, viewpoint serves as a warning signal that the government is acting for other reasons.

But even if this distinction holds, the hard question remains: should the Court accept pornography or hate speech as a low-value category of expression? The currently recognized categories of low-value speech seem to share the trait, as Cass Sunstein writes, that they are neither "intended [nor] received as a contribution to social deliberation about some issue."[81] That definition offers several lessons for any regulation, concededly based on viewpoint, either of hate speech or of pornography. In the case of hate speech, such an ordinance should be limited to racist epithets and other harassment: speech that may not count as "speech" because it does not contribute to deliberation and discussion. In the case of pornography, any ordinance should be limited to materials that operate primarily (as obscene materials operate primarily) as masturbatory devices; in addition, an explicit exception, like that in the obscenity standard, for works of serious value ought to be incorporated. Only if pornography and hate speech are defined in this narrow manner might (or should) the Court accept them as low-value categories—a classification that, it must be remembered, depends at least as much on the non-expressive quality of the speech as on the degree of harm the speech causes.

In addition to all this, perhaps one other factor—the modesty, or limited nature, of the viewpoint restriction—should be considered prior to recognizing a low-value category of speech incorporating viewpoint bias. This inquiry would focus on whether the regu-

[81] Sunstein, 60 U Chi L Rev at 807.

lation of the category wholly excises the viewpoint from the realm of public discourse or cuts off only a limited means of expressing the viewpoint.[82] Even the MacKinnon-Dworkin version of anti-pornography legislation would do only the latter: it would prohibit not all messages of sexual subordination, but only those messages expressed in a sexually graphic manner. This feature seems critical to the establishment of any exception to the viewpoint neutrality principle. The broader the restriction, the more it will skew public discourse toward some views and away from others. And the larger the skewing effect, the greater the chances of improper governmental motivation; a wholesale, more than a marginal, restraint suggests a government acting not for neutral reasons, but out of simple hostility to the idea restricted. Of course, the inquiry into the scope of a viewpoint restriction does not lend itself to scientific precision. The matter is always one of degree, involving the drawing of a line someplace on a spectrum. The inquiry, too, is complicated by the issue whether the particular means restricted (even if technically modest) constitute the most effective way of delivering the message, such that the restriction ought to be treated as sweeping. But the haziness of the endeavor does not gainsay the need to engage in it. For a viewpoint restriction that results in excising ideas from public discourse ordinarily ought not to be countenanced—even when the restriction applies only to low-value speech and even when the restriction closely responds to serious harms.

Conclusion

The presumption against viewpoint discrimination, relied upon in *Hudnut* and further strengthened in *R.A.V.*, has come to serve as the very keystone of First Amendment jurisprudence. This presumption, in my view, has real worth, in protecting against improperly motivated governmental action and against distorting effects on public discourse. And even if I assign it too great a value, the principle still will have to be taken into account by those who

[82] I do not at all advocate here that courts consider the modesty of a viewpoint restriction in all cases involving viewpoint regulation. Rather, I mean that courts should ask this question when the other criteria, discussed above, for departing from the viewpoint neutrality rule have been met. This approach is similar to the one used in *City of Renton v Playtime Theatres, Inc.*, 475 US 41, 53 (1986), in which the Supreme Court looked to the scope of the speech restriction at issue—an inquiry the Court normally eschews—in a case involving low-value speech. For a detailed discussion generally disapproving any inquiry into the modesty of a viewpoint restriction, although not considering the precise issue raised here, see Stone, *Content Regulation and the First Amendment* at 200-33 (cited in note 26).

favor any regulation either of hate speech or of pornography. I have suggested in this Essay that the regulatory efforts that will achieve the most, given settled law, will be the efforts that may appear, at first glance, to promise the least. They will be directed at conduct, rather than speech. They will be efforts using viewpoint-neutral classifications. They will be efforts taking advantage of the long-established unprotected category of obscenity. Such efforts will not eradicate all pornography or all hate speech from our society, but they can achieve much worth achieving. They, and other new solutions, ought to be debated and tested in a continuing and multi-faceted effort to enhance the rights of minorities and women, while also respecting core principles of the First Amendment.

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A Libel Story: *Sullivan* Then and Now

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A Libel Story: *Sullivan* Then and Now

Elena Kagan

ANTHONY LEWIS, *Make No Law: The Sullivan Case and the First Amendment.* New York: Random House, 1991. Pp. 354. $ 25.00.

New York Times v. Sullivan[1] is one of those rare cases—perhaps especially rare in the field of First Amendment law—in which the heroes are heroes, the villains are villains, and everyone can be characterized as one or the other. In *Sullivan*, lofty principle need not wrestle with distasteful fact; the ideal of free speech need not come to terms with base or injurious utterance. There is a beautiful simplicity about the case—a stark clarity—that lends itself to a certain brand of storytelling.

Anthony Lewis, columnist and former Supreme Court reporter for the *New York Times*, ranks by any measure among the premier legal storytellers of our time. Almost three decades ago, his *Gideon's Trumpet* made a folk hero of Earl Gideon and turned *Gideon v. Wainwright* into a metaphor for the wise and just use of law. Now Lewis has focused his sights closer to home, telling the equally significant story of how his newspaper in the *Sullivan* case helped to transform the law of libel and the very meaning of the First Amendment.

Among Lewis's talents is the journalistic gift of knowing a good story when he sees one. *Sullivan*, like *Gideon*, has a power stemming from its simplicity. And again like *Gideon*, it oozes drama. For purposes of narrative, it is hard to better a case that involves the most glamorous part of the

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1. 376 U.S. 254 (1964).

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Constitution, arose from the crucible of the civil rights struggle, and produced a decision of historic proportions. But the storyteller here is as good as the story. Pitching his book to a wide audience, Lewis makes not only *Sullivan* but the whole of First Amendment law come alive in the senses and imagination. Lewis explains legal concepts to the general reader with great facility. And he writes from the heart, communicating material that means much to him with the power and emotion necessary to render the material meaningful to others.

Make No Law is in part simple narration, but its recitation of facts is virtue, not vice. In telling the story of *Sullivan*, Lewis performs the signal task of demonstrating how much facts matter, of showing the extent to which a legal decision may (and should) be dependent on context and circumstance. Lewis's narrative, including his account of the Supreme Court's deliberations (an account based largely on Justice Brennan's private papers), serves to highlight the role of anecdote in law. In deciding *Sullivan*, the Court was in large part responding to a story—the selfsame story Lewis tells with a journalist's eye for vignette and detail.

Lewis, however, is not content to give just the facts; he spins stories with morals. Juxtaposed against Lewis's immersion in context is a tendency to generalize broadly from his subject matter. On one page, Lewis revels in the particular facts of *Sullivan*; on another, he uses these facts as springboard to justify principles of libel law and First Amendment law applicable to a much wider range of cases. This method, of course, is not itself mistaken. Stories often teach general lessons, and the drawing of morals may be especially appropriate in legal stories because the technique mirrors the way law naturally (perhaps inevitably) develops. Indeed, the Supreme Court has done exactly what Lewis favors, extending the rules articulated in *Sullivan* to a broader set of libel cases and using *Sullivan* as authority for some sweeping First Amendment principles.

The real question is not whether to go beyond the original context of a case but how best to do so. The drawing of morals from a story may be more or less apt; so, too, may be the creation of legal rule and principle. Thus, the question, put more precisely, is whether Lewis—or, more important, the Court—has generalized appropriately from *Sullivan*, has seen what the case was truly about and has used this understanding to denote where the case has relevance.

The answer to this question, I think, is mixed, and in much of the rest of this review I offer some thoughts about how and why this is so. After reviewing Lewis's account of *Sullivan*, I discuss aspects of the decision that raise greater problems than Lewis concedes. I then address two different levels of generality on which the *Sullivan* decision may operate. On the first level, *Sullivan* generates special rules of defamation law; on the second level, discussed more briefly, *Sullivan* stands for broader First Amendment

principles. The use of *Sullivan*, by Lewis and the Court, to support a corpus of defamation law strikes me as troubling: as an effort to fit the square pegs of many defamation cases into the round holes of *Sullivan*. Lewis and the Court, I think, do far better when invoking *Sullivan* on the broader level of First Amendment principle. It is there that the *Sullivan* case resounds most deeply.

I. THE CASE AND THE RULING

To evaluate when and where the *Sullivan* decision has meaning, the place to start is with the case decided. Lewis provides a vivid account of the underlying controversy as well as its treatment in the courts. This account provides a basis for reflecting on the central concerns of the decision. But what seems to emerge is something different from what Lewis (or any other proponent of expanded protection for libel defendants) might have intended. The context of the case and the Supreme Court's own deliberations suggest that *Sullivan* was only secondarily—almost accidentally—a decision about the law of defamation. The Court's decision—including the puzzling adoption of the actual malice standard—responded primarily to the core First Amendment problem of the abuse of power to stifle expression on public issues, a problem only contingently related to the law of defamation.

A. The Case

The basic facts of *Sullivan* are familiar, although perhaps more so to readers of this journal than to readers of Lewis's book. On 29 March 1960 an advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South appeared in the *New York Times*. The ad, headlined "Heed Their Rising Voices," contained ten paragraphs of text detailing efforts by "Southern violators of the Constitution," including police officers, to derail the civil rights struggle through acts of governmental abuse and violence. L. B. Sullivan, a Commissioner of the City of Montgomery, Alabama, in charge of supervising the city's police, brought a libel suit based on the ad against the *New York Times*. Sullivan's name never appeared in the ad, but he claimed that statements about the Montgomery police and southern law violators had been read to refer to him. Sullivan further claimed that several admitted—though mostly minor—inaccuracies in the ad had harmed his reputation. An Alabama jury returned a verdict for Sullivan in the full amount demanded—a half-million dollars—and the Alabama Supreme Court affirmed. So much is found in the U.S. Supreme Court's majority opinion.

To this factual core, Lewis adds a wealth of detail about the case and its treatment in the Alabama trial court. The advertisement quickly became notorious in Montgomery, even though only about 400 copies of the *New York Times* were circulated in all of Alabama. The Montgomery *Advertiser*, the morning newspaper in the city, brought the ad to the city's attention with an editorial charging "crude slanders against Montgomery" by "voluntary" and "involuntary liars" (at 11); and by the time the *New York Times* went searching for local counsel, not a single Montgomery lawyer would take the case (at 24). (The *Times* found a Birmingham lawyer, who booked hotel reservations for the primary *Times* counsel, Lewis Loeb, under an assumed name (at 24).) The trial judge, Walter Burgwyn Jones, publicly had proclaimed his belief in "white man's justice" and had authored a tract entitled *The Confederate Creed*; on the 100th anniversary of the founding of the confederacy, he had participated in a reenactment of the swearing in of Jefferson Davis (adminstering the oath of office) and then retired to his courtroom to preside over a trial in which jurors wore confederate uniforms (at 25–26). Lewis conjectures that Jones may even have helped to plan Sullivan's libel suit, although (as Lewis admits) there is little in the way of proof to back up this surmise (at 27). In any event, Jones presided over the trial (in a racially segregated courtroom) and found in favor of the plaintiff on every significant ruling; the all-white jury, instructed that the advertisement was libelous, false, and injurious as a matter of law, took about two hours to decide that the advertisement was "of and concerning" Sullivan and that he should receive $500,000 (at 32–33).

Lewis shows that the *Sullivan* trial was merely the first salvo in a concerted campaign against the northern establishment press by southern public officials and opinion makers—a campaign which intended to curtail media coverage of the civil rights struggle and threatened to succeed in this design. The *Sullivan* case was the first of five suits brought by public officials based on the "Heed Our Rising Voices" advertisement; each of the other suits also claimed damages of $500,000 (at 35). Two stories by *New York Times* reporter Harrison Salisbury prompted another round of libel suits, asking for total damages of $3,150,000 against the *Times* and $1,500,000 against Salisbury (at 22). Nor was the *Times* the only target; by the time the Supreme Court decided *Sullivan* in 1964, southern officials had brought nearly $300 million in libel actions against the press (at 36). The Montgomery *Advertiser* candidly headlined a story about the libel cases: "State Finds Formidable Legal Club to Swing at Out-of-State Press" (at 35). The *Alabama Journal*, Montgomery's evening paper, noted that the suits "could have the effect of causing reckless publishers of the North . . . to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns" (at 34). And the suits indeed could have had great effect. The *Times* withdrew all of its reporters

from Alabama for a year in order to maintain a personal jurisdiction argument (at 43). There was some danger that the newspaper, then struggling with labor disputes and making minuscule profits, would not survive (at 35). CBS, according to one of its attorneys, would have ceased doing programs on the southern civil rights movement had the *Sullivan* verdict not been reversed (at 245).

Lewis leaves little doubt that the particular facts of *Sullivan*, as well as the surrounding libel suit campaign, powerfully affected the Court. Suppose, Lewis asks the reader to consider, Sullivan had had the modesty (or foresight) to strike a zero from his damage claim (at 161). Would the Court then have decided to review the case? Would the *Times* even have filed a cert petition?[2] Or suppose that the *Times* advertisement really had defamed Sullivan, referring to him by name in a manner that unjustly harmed his reputation.[3] Or suppose that the *Sullivan* suit had not instigated a flood of other libel cases by southern officials—cases specifically noted in both the majority opinion and Justice Black's concurrence. Lewis, as well as all of the attorneys involved in the case, believe that the Court would have let the *Sullivan* verdict stand in the absence of this special set of circumstances (at 161): what galled the Court was something much more than that a single public official had recovered a libel judgment for an innocent defamatory statement.

B. The Ruling

One clue to understanding what concerned the Court in *Sullivan* may lie in an arresting quiet at the center of the case—specifically, in the Justices' failure during deliberations to criticize, debate, or question the majority opinion's adoption of the actual malice standard.[4] Although Lewis

2. Lewis notes that soon after the *Times*'s general counsel requested Herbert Wechsler to draft a petition for certiorari, *Times* editors summoned Wechsler to a meeting to defend the decision to seek review of the verdict. Wechsler told Lewis: "I was being asked to show cause why I should file a petition for certiorari. I found myself defending the legal position I was advancing in defense of the *Times*—that the First Amendment applied to libel cases. . . . People were asking why it wasn't enough for the *Times* to 'stick to our established position that we never settle libel cases, we publish the truth, if there's an occasional error we lose and that's one of the vicissitudes of life'—that at a time when I was told the paper was barely making a profit and these judgments were mounting up" (at 107). The anecdote reveals how greatly the attitudes and expectations of the American press have changed since *Sullivan*—perhaps due to *Sullivan* itself. See *infra* at pt. II.A. pp. 711–12.

3. Justice Black's concurring opinion in *Sullivan* wryly noted that the "record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the *Times*' publication." 376 U.S. at 294.

4. Under the actual malice rule, a libel plaintiff must show that the defendant published the challenged statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. A defendant acts with "reckless disregard" when he "in fact entertain[s] serious doubts as to the truth of his publication." St. Amant v.

fails to highlight the point, his description of Justice Brennan's papers (which include all the Justices' notes to each other, as well as a memorandum written by a law clerk detailing the Court's deliberations) makes this lack of controversy immediately apparent. Throughout the Court's lengthy and active consideration of the case,[5] the actual malice standard—in hindsight, by far the most significant aspect of the opinion—occasioned almost no debate, even though the Court at conference had agreed to decide the case on the narrower ground that the Constitution required clear and convincing proof of every traditional element of a libel action in a case involving a public official (at 165–66). Justices Douglas, Black, and Goldberg sent notes to Justice Brennan explaining that they favored absolute immunity from libel suits brought by public officials about official conduct (at 171), and they eventually filed concurring opinions taking this position. But none of the Justices who ultimately signed on to Justice Brennan's opinion raised any questions about the actual malice standard: Was it too strict? Was it necessary? Where did it come from? How would it work? On these critical issues, silence reigned.

The Justices instead fretted about a part of the opinion that today seems far less important: the application of the new standard to the evidence in the case. All the notes from the Justices concerned the question whether the Court properly could apply the actual malice standard to the evidence below—or could go even further and prevent a new trial at which Sullivan might offer additional evidence (at 172–82).[6] The latter position attracted little support, but the former eventually trumped concerns that the Court would overreach its authority by examining the sufficiency of the evidence under the new standard. Chief Justice Warren noted that without such an examination, "we will merely be going through a meaningless exercise. The case would be remanded [and] another improvisation would be devised" (at 178). And Justice Brennan reminded his colleagues that "there are a number of other libel suits pending in Montgomery and in Birmingham and those concerned should know what to expect in the way of judicial superintendence from this Court" (at 177). Such pragmatic concerns about applying the new rule to prevent recovery by Sullivan and others—about dealing with the particular problem facing the Court—overwhelmed abstract consideration of the rule itself.

But more might be said than that the factual situation before the Court pushed legal questions to the margin: the adoption of the actual

Thompson, 390 U.S. 727, 731 (1968). Under traditional common law rules of libel, the plaintiff need make no such showing: the plaintiff must establish only that the defendant has published a false defamatory statement "of and concerning" the plaintiff.

5. Justice Brennan wrote no fewer than eight drafts of his majority opinion, most of which were circulated to the other members of the Court (at 164).

6. The alternative, of course, was to leave to the state courts the task of applying the new standard to the evidence in the case.

malice rule by Justice Brennan, and the Court's ready and unquestioning acceptance of it, may in fact have *resulted from* the extraordinary circumstances of the case. One of the great puzzles of *Sullivan* concerns why the Court adopted the actual malice rule rather than decide the case on one of numerous available grounds based on common law principles: that the published statements were not "of and concerning" Sullivan; that they were not substantially false; that they did not injure his reputation. Richard Epstein, for example, recently has suggested that the *Sullivan* Court took the wrong tack: that it should have decided the case on the ground that the common law rules of libel represent the constitutional norm in a public official libel case and that the Alabama courts had failed to follow these rules.[7] Justice Brennan's initial rationale for reversing the judgment—that the Constitution requires clear and convincing proof of every traditional element of defamation in actions involving public officials—resembles Epstein's proposed approach: each imports the Constitution into libel cases brought by public officials, but in some manner pegs constitutional requirements to the common law. *Make No Law* does not reveal precisely why Justice Brennan abandoned his intitial rationale and adopted the actual malice rule: Lewis says only that Brennan wrote the initial draft himself and must have changed his mind in the course of composition (at 166). The broader story that Lewis tells, however, may provide the key—and it may do so in either of two related ways.

Most pragmatically, if the dominant concern of the Court was to prevent recovery not only by Sullivan but by the host of other southern officials who had filed libel suits on the basis of articles about the civil rights movement, the actual malice standard may have appeared by far the best approach. Even if the *Sullivan* verdict itself could have been reversed by constitutionalizing common law rules, numerous other libel cases brought by southern officials—some undoubtedly stronger under common law principles—would remain. The Court's decision in *Sullivan* removed the threat of all these cases: Sullivan himself decided not to seek a new trial and the other libel actions brought by southern officials quickly fell away (at 161). It seems doubtful whether Justice Brennan's original rationale or any other similar approach would have sent so strong a message or had such a powerful effect. Without some significant addition to common law requirements, the Court may have felt, the danger confronting speech about the civil rights movement would not dissipate. As Justice Black wrote in a note to Justice Brennan lauding his opinion, "Most inventions even of legal principles come out of urgent needs" (at 175).

On a somewhat deeper level, the adoption of the actual malice standard may have resulted from the Court's understanding that the "ur-

7. See Richard Epstein, "Was *New York Times v. Sullivan* Wrong?" 53 *U. Chi. L. Rev.* 782, 792–93 (1986).

gency" of the situation arose not from charges of defamation per se but from an organized government campaign to stifle public criticism, which happened to take the form of defamation suits. Under this view, *Sullivan* and the other suits brought by southern officeholders were not simple libel cases. The complaints may have charged "defamation," but the underlying reality was of governmental suppression of critical speech. In effect, *Sullivan* resembled the garden-variety libel suit far less than it resembled cases like *Abrams*[8] and *Gitlow*[9] and *Whitney*[10]—cases in which the government had prosecuted expression hostile to and disruptive of official policy. One of the great strengths of *Make No Law* is to bring out this essential connection by interrupting the narrative of *Sullivan* with a 50-page primer on the evolution of free speech principles—especially concerning seditious advocacy—prior to the time of *Sullivan*. Justice Brennan's opinion well understood this connection: his insistence that the "mere label[. . .]" of libel could not foreclose constitutional challenge, his focus on the rights and duties of citizens to criticize government, his discussion of the unconstitutionality of efforts to criminalize sedition—all suggested that he viewed the case before him as having little to do with the mine run of libel actions and much to do with the worst kinds of censorial abuses. No wonder Justice Brennan went further than merely to constitutionalize common law libel requirements; to him, *Sullivan* was something other than—or at least something more than—a libel suit.[11] In essence, the facts of *Sullivan* had compelled the Court to create a new paradigm. Public official libel suits were different: they were not (or not merely) attempts by individuals to redress damage to personal reputation, but rather were attempts by government to shut down criticism of official policy. To treat them simply as libel suits was to miss the point.

II. SULLIVAN AND LIBEL LAW

Seen in this light, the revolution worked by *Sullivan* in the treatment of public official libel suits appears justified, correct, even obvious. But not all such suits look like *Sullivan*, and the use of the actual malice standard in even this limited category of cases often imposes serious costs: to reputa-

8. Abrams v. United States, 250 U.S. 616 (1919).
9. Gitlow v. New York, 268 U.S. 652 (1925).
10. Whitney v. California, 274 U.S. 357 (1927).
11. Viewed in this light, the only real question is why Justice Brennan stopped short of adopting the position that absolute immunity is appropriate in cases like *Sullivan*. Lewis aptly notes that much of Justice Brennan's opinion points toward a rule of absolute immunity; only at the last moment did he lurch toward adoption of the actual malice standard (at 146–47). Perhaps this was the moment at which Justice Brennan recognized that even libel actions brought by public officials posit false statements of fact injurious to reputation and therefore are distinguishable—in theory if not necessarily in practice—from more general governmental efforts to suppress hostile comment and criticism.

tion, of course, but also, at least potentially, to the nature and quality of public discourse. The adverse consequences of the actual malice rule do not prove *Sullivan* itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far. And that question can be answered only by returning to *Sullivan* itself and focusing on what the decision most fundamentally concerned. In such an inquiry, Lewis's book serves an ironic function. No doubt the work was partially designed to justify (indeed, augment) the level of protection currently accorded to defendants in libel cases.[12] But by enhancing our understanding of *Sullivan*, Lewis casts doubt on the broader structure. The paradigmatic case increasingly appears exceptional—or at least far removed from many cases currently equated to it. These cases—and the rules that give rise to them—stand in need of independent justification. Taken alone, the particulars of *Sullivan* seem only to belie the generalities of libel law. The moral does not follow from the story.

A. Unintended Effects

To Lewis, as to most of the press, *Sullivan* is a kind of icon—a thing to be celebrated and adored and never, ever criticized. Lewis opens his book by thanking Justice Brennan: "What Justice Brennan did for all of us when he wrote the opinion in *New York Times v. Sullivan* needs no further comment" (at x). Virtually everything journalists say or write about *Sullivan* echoes this sentiment. But there is reason to think, with the benefit of hindsight, that what Justice Brennan did in *Sullivan* needs much further comment—and that this comment should take forms other than simple homage.

The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy. Lewis, to his credit, concedes this harm, without attempting to minimize it. He tells, for example, the story of John Goldmark, a member of the Washington State Legislature, who in 1962 became the object of a false and vicious red-baiting campaign and, largely as a consequence, lost his seat (at 227). When Goldmark won a libel judgment two years later, the pre-*Sullivan* press praised the verdict: one major newspaper editorialized that "[a] few more verdicts like th[is] one . . . might restore the nation to the tolerant level where the constitutional freedoms could be exercised as they should be in a free country" (*id.*). But within months *Sullivan* appeared, and Goldmark's judgment was set aside because

12. In *Make No Law*, Lewis urges the Court not merely to retain the actual malice standard in all cases in which it currently applies but also to limit damages in such cases to out-of-pocket losses (at 226).

of failure to prove actual malice. He thus became one of the first victims of the *Sullivan* standard: persons who (unlike Sullivan himself) had suffered real reputational injury and yet were unable to recover for it.

Lewis's response to these cases is the familiar one (implicitly adopted in *Sullivan*) that such personal harm is the unfortunate but necessary consequence of a rule promoting the social good of uninhibited comment concerning public officials. But even if we assume that the actual malice standard in fact encourages speech about public officials—itself a somewhat uncertain proposition[13]—this response begs an important (if almost equally familiar) question: Is uninhibited defamatory comment an unambiguous social good? That is, does it truly enhance public discourse?[14]

This question, never addressed by Lewis, poses a challenge to his and the *Sullivan* Court's view of the effect of the actual malice standard, outside the context of the *Sullivan* case itself, on the quality of public discourse and hence on the democratic process. The ultimate concern of *Sullivan* was to strengthen that process by ensuring that the citizenry receive important information about the conduct and policies of government officials. Certainly, the application of the actual malice standard in *Sullivan* served that function. But the malice standard may not have the same effects when applied more generally. Several commentators have noted that to the extent *Sullivan* decreases the threat of libel litigation, it promotes not only true but also false statements of fact—statements that may themselves distort public debate.[15] Here, too, the *Goldmark* case provides a telling counterexample to *Sullivan*: the false charges of Communist Party associations in that case more likely corrupted than enhanced the realm of public

13. Lewis devotes much attention to whether the actual malice rule actually encourages speech, but his discussion backtracks on itself. On the one hand, Lewis insists that the *Sullivan* rule was responsible for press coverage of some of the most important national stories of the past decades, including Watergate and the Vietnam War (at 158). The part of this claim relating to Vietnam seems wildly overdrawn. If, as Lewis writes, journalists during the Vietnam War began to show less deference to official accounts and judgments than in the earlier years of the Cold War, surely this newfound independence had more to do with changed attitudes toward government players and policies than with changed rules of libel law. Lewis seems on more solid ground when he contends that libel rules affected coverage of the Watergate scandal. Still greater plausibility would attach to a claim that the actual malice rule freed smaller media outlets, whose very existence could be threatened by a libel judgment, to confront powerful local politicians. But Lewis makes a number of observations that place even this scaled-down claim in doubt. He notes that several earlier periods of American history saw savage attacks on political leaders by the press (at 206–7); and he concludes that the "notion that the press was harder on public servants after 1964 is contradicted by history" (at 206). Even more important, Lewis several times asserts (in making the claim for augmented libel protection) what has become a commonplace in press circles: that in practice the actual malice rule has raised the costs and stakes of libel litigation and thereby may have *increased* press inhibitions (at 200–202, 244). In the absence of any empirical data, choosing between such rival assertions becomes a matter of crude intuition.

14. The question is discussed in most expansive form in Lee Bollinger, *Images of a Free Press* 26–39 (Chicago: University of Chicago Press, 1991).

15. See, e.g., *id.* at 26–27, 35–36.

discourse. In this way, the legal standard adopted in *Sullivan* may cut against the very values underlying the decision.

The problem, indeed, may go even deeper: it may involve not merely the promotion of false statements but also a more general tendency to sensationalize political discourse. When the press stops worrying about the accuracy of defamatory statements, it may start covering subject matter not readily amenable to determinations of truth or falsity; that subject matter, whether true or false, often ranks high in sensationalist content. Thus, the *Sullivan* decision, although itself involving core political speech, may have facilitated (which is not to say "caused") both the rise of tabloids and the "tabloidization" of the mainstream press. And arguably, such expression—the obvious example here is speech concerning the private and sexual lives of political figures—distracts from and devalues the kind of discourse *Sullivan* meant to promote. The poverty of such speech does not itself provide a reason for suppression; the First Amendment would mean little if government could restrict speech whenever it were deemed distracting or demeaning or even false. But with respect to libel law, the interest in reputation provides the reason for regulation; the regulation falls only because the benefits of the additional speech outweigh its reputational costs. To the extent that the speech promoted makes little contribution to public dialogue, the relaxation of libel law seems difficult to countenance.

Make No Law includes copious evidence that the press in pre-*Sullivan* days demonstrated great sensitivity to this range of questions. Lewis, for example, recounts that just after the Court decided *Sullivan*, a principal editor of the *Times* wrote a letter to Herbert Wechsler, author of the *Times*'s winning brief, saying that "we may be opening the way to complete irresponsibility in journalism" and asking whether it was right to erode principles of journalistic responsibility just "because justice is lopsided in one area of the nation" (at 219–20). Similarly, Lewis notes the reluctance of the *Times* even to ask the Supreme Court to review the *Sullivan* case given the newspaper's standard position that "we publish the truth, if there's an occasional error we lose and that's one of the vicissitudes of life" (at 107). And Lewis cites several cases in which the press approved of libel verdicts notwithstanding (or even because of) their inhibition of speech: in one case, the *Times* praised a $3.5 million judgment as likely to have a "healthy effect" on public discourse (at 112).

Today's press engages in far less examination of journalistic standards and their relation to legal rules. Rather than asking whether some kinds of accountability may in the long term benefit journalism, the press reflexively asserts constitutional insulation from any and all norms of conduct. Lewis himself notes this air of exceptionalism and entitlement. He writes that "[p]hrases such as 'freedom of the press' or 'First Amendment rights'" have assumed the aspect of "exclusivist dogma[,]" with "[s]ome

editors and publishers act[ing] as if the . . . First Amendment were designed to protect journalism alone, and to make that protection superior to other rights" (at 208). In this vein, he aptly observes: "When the Supreme Court decides a case against a claimed press interest, editors and publishers too often act as if the Constitution were gone" (at 209). And Lewis discusses as well the unwillingness of the press to confess to error, using as an example of this "stiff-necked press behavior" *Time* magazine's refusal to retract an unsupported assertion about the activities of former Israeli Defense Minister Ariel Sharon (at 208). Yet having said all this, even Lewis stops short of questioning whether current libel law has had any detrimental effects on journalistic practice. What *kinds* of speech has *Sullivan* promoted? Is it related—and, if so, how—to trends in journalism of dubious value? Lewis, unlike the earlier generation of journalists he cites, declines to consider these old (but never more potent) issues.

And this contrast raises a final question about the unintended effects of *Sullivan*: Is it possible that *Sullivan* bears some responsibility for a change in the way the press views itself and its conduct—a change that the general public might describe as increased press arrogance? It is wise to be wary about attributing too much cultural impact to a Supreme Court decision; yet it is hard to believe that those most directly affected by a decision like *Sullivan* are in no way changed by it. At the most basic level, judicial declarations of unaccountability can go to the head. It is hardly unthinkable that increased legal protection may lead to a greater sense of entitlement and self-importance (which in turn may manifest itself in questionable conduct). But the effects of *Sullivan* on the press's conception of itself may go yet deeper. Just as the Court treats the story of *Sullivan* as an archetype, so too may the press: the heroic role of the *Times* in that case helps to define and inform self-understanding. This mythical image may at times serve as model, but it also may blind the press to numerous less attractive aspects of its role and performance.[16] Thus, the self-image of the press becomes semi-delusional, and journalists cease to ask the questions of themselves which they ask of other powerful actors in society.

Questions of this kind in no way prove that the Court decided *Sullivan* incorrectly or that the Court now should reconsider its holding. The story of *Sullivan* rebels against this conclusion, whether that story is framed as a particular tale of how southern public officials attempted to suppress commentary about the civil rights movement (and thus to suppress the

16. In *Images of a Free Press*, Lee Bollinger posits that the image of the press portrayed in *Sullivan* and similar cases may entice the press to conform to norms of quality journalism. See *id.* at 40–61. I agree with Bollinger that the *Sullivan* Court articulated a certain image of the press and that the press largely has absorbed that image. We disagree as to the consequences of this process. Whereas Bollinger believes that the absorption of the *Sullivan* image often uplifts the press, I believe the absorption of that image more often succeeds only in blinding the press to its own shortcomings as well as its capacity to inflict unjust harm.

movement itself) or as a more general tale of how government officials may attempt to stifle criticism of themselves and their policies. But to view *Sullivan* as a kind of icon—a decision about which "nothing more need be said" (at x)—is too easy by half. If nothing else, such a view may distort consideration of the question whether and how *Sullivan* should be extended. This question has occupied the Court from the time of *Sullivan* to this day, and Lewis discusses the Court's responses in detail. But because he fails to acknowledge fully the difficulties associated with the *Sullivan* rule itself, he can accept in the blandest way all further extensions of the principle. He need never confront the question—a question intertwined with the very meaning of *Sullivan*—of the decision's proper limits.

B. Questionable Extensions

In one of the first commentaries on *Sullivan*, Harry Kalven predicted that the Court would not long view the decision as "covering simply one pocket of cases, those dealing with libel of public officials."[17] The Court, Kalven predicted, would accept an "overwhelming . . . invitation to follow a dialectic progression" from the category of public officials to other categories yet further-reaching.[18] And although Kalven mistook the precise steps in the progression,[19] he soon saw confirmed his basic prophecy. In a series of cases succeeding *Sullivan*, the Court extended at least some level of constitutional protection to defendants in nearly all libel cases. This course, however, proved more problematic than Kalven anticipated. In extending *Sullivan*, the Court increasingly lost contact with the case's premises and principles. Even when viewed most broadly, *Sullivan* relied upon two essential predicates: a certain kind of speech and a certain kind of power relationship between the speaker and the speech's target. These attributes of the case, once so vital, became submerged in the Court's subsequent construction of libel doctrine.

The constitutional scheme that today governs libel cases is familiar, the way it operates in practice somewhat less so. Not only public officials, but also so-called public figures must prove actual malice to recover for defamation.[20] Who is a public figure? Although the Supreme Court attempted for some years to impose limits on the category, lower courts have interpreted it expansively.[21] The official definition of a public figure in-

17. Harry Kalven, Jr., "The *New York Times* Case: A Note on 'The Central Meaning of the First Amendment,'" 1964 *S. Ct. Rev.* 191, 221.

18. *Id.*

19. Kalven believed that in offering constitutional protection from libel suits, the Court should and would move "from public official to government policy to public policy to matters in the public domain." *Id.*

20. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

21. The Supreme Court has ruled on several occasions that libel plaintiffs were not

cludes any individual who has achieved "pervasive fame or notoriety" or who "voluntarily injects himself or is drawn into a particular public controversy."[22] A more informal definition might go something like: Everyone the reader has heard of before and a great many people he hasn't. The vast majority of those likely to attract media attention fall within the category.[23] Even plaintiffs lucky enough to be labeled private figures generally must satisfy a heightened standard of liability: negligence to recover compensatory damages and actual malice to obtain presumed or punitive damages.[24] Given the frequent difficulty of proving actual injury in defamation suits, as well as the economics of litigation, many of these suits are tenable only with evidence of actual malice.[25] In a tiny category of cases, in which a private figure is defamed on a "matter of purely private concern," the actual malice standard disappears, as may all other constitutional requirements.[26] The upshot of the system is that the constitutional standard established in *Sullivan* for a public official bringing a libel suit against critics of his official conduct today governs the bulk of defamation cases, at least against media defendants.[27]

Lewis is generally sanguine toward this result, though he admits now and again to some concern. Tracing the course of post-*Sullivan* libel law, Lewis arrives at the case of entertainer Wayne Newton, who lost a multimillion-dollar libel judgment, arising from an allegation that he associated with a Mafia figure, for failure to prove actual malice (at 197–98). "Philosophically," Lewis concedes, "cases like Wayne Newton's are a long way from the Alabama lawsuit that led the Supreme Court to bring libel within the First Amendment"; had the *Sullivan* case never arisen, the Supreme

public figures. See Wolston v. Reader's Digest, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). For a review of lower court decisions to the opposite effect, see David Anderson, "Is Libel Law Worth Reforming?" 140 *U. Pa. L. Rev.* 487, 500–501 (1991).

22. Gertz v. Robert Welch, Inc., 418 U.S. at 351.

23. See Anderson, 140 *U. Pa. L. Rev.* at 501. Some cases demonstrating the range of the public figure category are: Trotter v. Jack Anderson Enterprises, 818 F.2d 431 (5th Cir. 1987) (president of Guatemalan soft-drink bottling company); McBride v. Merrell Dow & Pharmaceuticals, 800 F.2d 1208 (D.C. Cir. 1986) (expert witness); Dameron v. Washington Magazine, 779 F.2d 736 (D.C. Cir. 1985) (air traffic controller); Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980) (former girlfriend of Elvis Presley), *cert. denied*, 452 U.S. 962 (1981); James v. Gannett Co., 353 N.E.2d 834 (N.Y. 1976) (belly dancer).

24. Gertz v. Robert Welch, Inc., 418 U.S. at 347–49.

25. See Anderson, 140 *U. Pa. L. Rev.* at 502.

26. See Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 759–61 (1985), in which the Court held that in a private figure/private concern case, a showing of actual malice was unnecessary even to obtain presumed and/or punitive damages. The Court left open the question whether any heightened constitutional standards (relating, for example, to burdens of proof) apply in such cases.

27. One study of appellate cases involving media defendants found 75 cases in which the actual malice standard controlled and only 24 in which any lesser standard controlled. See Marc Franklin, "Suing Media for Libel: A Litigation Study," 1981 *A.B.F. Res. J.* 795, 824.

Court surely would have rebuffed a claim by the press that the First Amendment barred Newton's recovery (at 198). But having acknowledged the gulf between the two cases, Lewis minimizes its significance. What took the Court from protecting the "citizen-critic of government" to protecting detractors of an entertainer, Lewis writes, was good constitutional common law decision making. In expanding the reach of the First Amendment over libel actions, the Justices "were guided by their sense of the society: its traditions, its needs, its changing character" (at 198). Indeed, Lewis implies, we should count ourselves fortunate that "a libel case that really did engage the central meaning of the First Amendment had come along" first, so that it could call forth "a transforming Supreme Court decision" which then would "spread to a much larger field" (at 198).

But the mere restatement of this conclusion demonstrates its oddity. Why is the Supreme Court's libel jurisprudence an example of praiseworthy incremental decision making if it extended constitutional protection from cases that "really did engage the central meaning of the First Amendment" to cases that (impliedly) really did not? What does a case concerning criticism of a government official's public conduct have to do with a case concerning comments on a popular entertainer's private associations? The chasm between the two cases noted by Lewis easily could have been even wider. The actual malice standard would have applied in *any* libel suit brought by Newton, simply by virtue of his fame;[28] imagine, for example, a case arising from an allegation not of a Mafia connection but of an adulterous relationship. Or consider the many cases—the recent *Masson v. New Yorker* is an example—in which the actual malice standard applies even though the plaintiff is both unknown beyond a narrow circle and uninvolved in governmental affairs, because of his participation in one of the countless significant and not-so-significant matters that can be deemed a "public controversy."[29] The use of the actual malice standard in this wide range of cases appears to have little connection with the story of *Sullivan*. Viewed from that vantage point, current libel law seems the result not of steady and sensible common law reasoning but of a striking disregard of the doctrine's underpinnings.

28. "Pervasive fame or notoriety" makes a person a public figure for purposes of any statement made about him, regardless of the subject matter. See Gertz v. Robert Welch, Inc., 418 U.S. at 351. Newton, like all "celebrities," thus qualifies as a public figure in any libel suit. Indeed, the district court handling Newton's case imposed sanctions of $55,000 on him for contesting the public-figure issue at all. See Newton v. National Broadcasting Co., 930 F.2d 662, 668 n.6 (9th Cir. 1990).

29. See Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991). Although in one case the Supreme Court held that a widely publicized divorce proceeding was not a public controversy, see Time, Inc. v. Firestone, 424 U.S. 448 (1976), courts generally have shied away from declaring matters reported on by the press to be something other than public controversies. The more usual ground for private-figure status is that the plaintiff insufficiently involved himself in the relevant controversy. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323; Wolston v. Reader's Digest, 443 U.S. 157.

However unwittingly, *Make No Law* thus supports a claim that the Court accorded *Sullivan* too great a significance—a significance outstripping the case's real meaning—in the development of constitutional rules relating to libel law. In the course of constructing a constitutional regime to govern libel actions, the Court assimilated to *Sullivan* an array of cases divergent in character. Factual situtations posing different concerns, implicating different principles, became as one. In this sense, the development of libel law may be viewed not as a "rich . . . illustrati[on]" of the common law method in First Amendment law (as Lewis would have it (at 183)), but as a deviation from that method, with its characteristic focus on particulars and their relation to established principles.[30]

To say this much, of course, is not to claim that the Court should have declined to extend *Sullivan* at all. If *Sullivan* is not prototypical of libel actions, neither is it likely to be wholly freestanding. *Sullivan* may well have relevance beyond its boundaries, because libel of government officials may share sufficiently important traits with other instances of libel to justify extension of the actual malice rule to the latter. The key is to identify and explain the relevance of those common attributes. In this regard, two complementary possibilities present themselves.

One approach, articulated in various ways by both the Justices and commentators, would apply the actual malice rule to all (but only) those cases involving speech on governmental affairs—or, stated more broadly, speech on matters of public importance—or, stated still more broadly, speech on matters of public concern or interest.[31] This approach emerges from viewing *Sullivan* as primarily a case about the speech necessary for democratic governance. Such a view draws on some of the most notable features of the *Sullivan* opinion—the emphasis on seditious libel, the concern that citizens have access to the information necessary to act in their intended sovereign capacity, the statement of "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[32] Under this approach, a court would consider whether the speech in question is of a kind similar to the speech in *Sullivan*, in the sense that the content of the speech affects or relates to self-

30. For an exploration of this method, focusing on its use in First Amendment cases, see Cass Sunstein, "On Analogical Reasoning," 106 *Harv. L. Rev.* 741 (1993).

31. See Cass Sunstein, "Free Speech Now," 59 *U. Chi. L. Rev.* 255, 311 (1992) ("The test for special protection should be whether the matter bears on democratic governance, not whether the plaintiff is famous"); Frederick Schauer, "Public Figures," 25 *Wm. & Mary L. Rev.* 905 (1984). Justice Brennan appeared to advocate a similar approach when he urged that the actual malice standard apply to all cases involving speech on "matters of public interest." Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971) (Brennan, J.). But for Justice Brennan, this protection may have been meant to enhance, rather than to replace, the protection automatically accorded in public figure cases.

32. 376 U.S. at 270.

government. Comments, for example, about Wayne Newton or other celebrities currently classified as public figures might well flunk this test.

A second approach might focus not (or not only) on the content of the speech but on a concern arguably as essential to the *Sullivan* decision: the respective power of the speaker and the subject and the relation between the two. In *Sullivan*, the press (to the extent it targeted any particular individuals) criticized persons of substantial influence. Those persons derived their power from government positions, but this fact alone may not be of paramount importance. Chief Justice Warren understood *Sullivan* as resting on the simple presence of power—whether governmental or private did not matter—and the fear of its abuse.[33] To him, the principle of *Sullivan* applied with equal clarity to important figures in the "intellectual, governmental, and business worlds," both because individuals in each of these spheres exerted influence over the ordering of society and because they alike had means to counter criticism.[34] The implicit comparison is to cases in which speakers—who themselves may possess enormous influence—target individuals of lesser power and prominence. In such cases, the press may appear in the position of the southern officials of *Sullivan*, the targeted individuals in the position of the *New York Times*.

Under this view, the relevant spectrum in libel law runs between a case like *Sullivan* and a case in which the institutional press defames a relatively powerless individual (regardless whether the person might be viewed as involved in a public controversy). In *Sullivan* itself, the *New York Times* had little circulation and less influence in the relevant community; the ostensible target of its speech, by contrast, controlled vital levers of patronage and power. This situation has little in common with such recent Supreme Court cases as *Masson* or *Milkovich*, the former involving a renowned national magazine which allegedly defamed (by misquoting) the former Projects Director of the Sigmund Freud Archives, the latter involving a local newspaper that accused a high school coach of perjury.[35] Nor does *Sullivan* resemble, with respect to considerations of power, a host of cases that never reach the Supreme Court: for example, *Dameron v. Washington Magazine,* in which a magazine charged an air traffic controller with responsibility for a major accident (and subsequently retracted the state-

33. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring).

34. *Id.* at 163.

35. In Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991), the plaintiff conceded public-figure status at the beginning of the case; the Supreme Court granted certiorari to consider the question whether and when deliberate misquotation could constitute evidence of actual malice. In Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990), the plaintiff initially was held to be a public figure; only on his second appeal to the Ohio Supreme Court, occurring almost a decade after he brought suit, was this determination reversed. The Supreme Court reviewed the case to determine whether libel defendants are constitutionally entitled to a privilege for statements of opinion.

ment);[36] or *Fitzgerald v. Penthouse International*, in which a magazine accused an expert in "dolphin technology" with having committed espionage.[37] Part of what seems troubling about applying the actual malice rule to these cases arises not so much from the content of the speech (whether it relates to democratic governance) as from the respective societal positions of the speaker and the target. In such cases, the law insulates powerful institutional actors—possessing both a great capacity to harm individuals and a far-reaching influence over society at large—from charges of irresponsibility made by persons with little societal influence and few avenues of self-protection. If part of the point of *Sullivan* was to check the abuse of power and to ensure the accountability of those wielding it, then these cases suggest that the Court's constitutionalization of libel law has gone askew.

Assuming this is so, why has it occurred? The harshest interpretation is that the Court too little probed the foundations of *Sullivan* for clues to its proper application. Under this view, the very rightness of the *Sullivan* result combined with the power of its rhetoric to distract the Court from the (once all-important) context of the decision. The mismatch between *Sullivan* and many current libel cases is due simply to a lack of care and attention in applying the decision.

But a deeper explanation is available, involving the perceived necessity of using categorical rules in libel cases. For reasons having to do with certainty and predictability, the Court often has abjured contextual case-by-case inquiry in First Amendment adjudication, preferring to create rules applicable to broad categories of cases. Once a determination is made to adopt this approach in libel law, the question how to define the categories presents itself. Factors like those I have considered—the connection of speech to self-government or the relationship between the power of a speaker and a subject—resist reduction to simple categorical rules. Even if we were sure that power relations were all that mattered, how could we frame a rule to capture and compartmentalize so elusive a thing as the "power" of a speaker or a subject, let alone the relationship between the two? How could we then incorporate into this rule consideration of the content of the speech and its relation to democratic government—an inquiry which itself appears to demand a kind of fine discrimination in tension with the technique of categorization? However a flat rule is articulated, it may seem inadequate to the task to be accomplished.

The failures of the Court's libel law decisions ultimately may derive from just these problems rather than from a simple failure to respect the underpinnings of *Sullivan*. In some sense, the Court's categorical rules reflect an understanding of *Sullivan* as a case concerning both self-government and power relations. The public figure/private figure dichotomy is

36. 779 F.2d 736 (D.C. Cir. 1985).
37. 691 F.2d 666 (4th Cir. 1982).

animated partly by power considerations;[38] and the very definition of a public figure, as well as the bifurcation of the private figure sphere, reflect the view that some kinds of speech are of greater public importance than others.[39] But of necessity a great deal has been lost in the Court's attempt to combine and conflate these highly contextual considerations into a single set of categorical rules, susceptible of ready and predictable application. Because the rules serve only as rough and incomplete proxies for in-depth analysis of the factors relevant to *Sullivan*, the results as often as not fail to comport with the origins of libel law doctrine. In short, what has been lost in the Court's creation of our current highly stylized libel law regime—although perhaps inevitably—is *Sullivan* itself.

III. SULLIVAN AND FIRST AMENDMENT PRINCIPLE

And yet, on a different level, *Sullivan* may be counted (as I think Lewis would count it) the Court's most successful First Amendment decision. *Sullivan* may have proved a problematic foundation for libel law; it may differ too greatly from most (or many) libel cases to provide a sensible doctrinal base. But the very facts that make *Sullvan* an oddity in libel law place it in the mainstream of First Amendment law generally. As Justice Brennan may have recognized in writing the *Sullivan* opinion, the facts of *Sullivan* present in dramatic form the central concern of the First Amendment: the use of power—most notably, though not exclusively, government power—to stifle speech on matters of public import. Thus, *Sullivan* has served as an utterly reliable source not of libel doctrine but of broad First Amendment principle. And it is in making this point, in operating at this highest level of generality, that *Make No Law* truly shines.

The strongest portions of *Make No Law*, aside from the narration of the *Sullivan* story itself, come when Lewis leaves the field of libel law behind him and focuses on the broader wellsprings and offshoots of the decision. Lewis performs the prodigious feat of describing in an accessible but never simplistic way the development of the major principles of First

38. The Court has provided two justifications for treating public figures differently from private figures, one involving the greater self-help remedies available to public figures and the other involving public figures' assumption of risk. See Gertz v. Robert Welch, Inc., 418 U.S. at 344. At least the former justification is related to the power relations concern explicated in the text. Only Chief Justice Warren, however, has discussed explicitly the question of power in libel cases. See Curtis Publishing Co. v. Butts, 388 U.S. at 163–64.

39. Determination of public figure status partly involves the question whether the defamation has arisen from the plaintiff's participation in a "public" controversy, a term which at least suggests an inquiry into the subject matter of the speech. See *supra* text at note 22. Moreover, the private-figure sphere is itself divided into two subcategories by reference to whether the speech concerns public or "purely private" matters. See *supra* text at notes 24–26.

Amendment jurisprudence, in which *Sullivan* played a role central in both chronology and importance. If at times the narration smacks of Whig history, as the Court progresses ever onward toward the most luminous of goals, the material may provide ample justification for the treatment. Thus, Lewis links *Sullivan* on the one end with the great dissenting and concurring opinions of Holmes and Brandeis,[40] as well as with *Near*,[41] *Grosjean*,[42] and *Bridges*,[43] and on the other end with *Bond*,[44] *Brandenburg*,[45] *Cohen*,[46] the Pentagon Papers case,[47] and the flagburning cases.[48] The result is something more than a collection of "greatest First Amendment hits." It is an account of the development of certain core free-speech principles: that the people are sovereign in a democracy; that wide open debate is necessary if the people are to perform their sovereign function; that government regulation of such debate should ever be distrusted. In turn, these principles provide the measure of current First Amendment problems. Thus, Lewis makes a compelling case that the greatest of all obstacles to a flourishing system of freedom of expression is governmental secrecy, especially in matters pertaining to national security (at 241–43). And indeed, this matter resonates with *Sullivan* more strongly than does the run-of-the-mine libel action.

Above all, as Lewis highlights, *Sullivan* is a statement—the Court's strongest statement—of core First Amendment values. In its substance—and also, if the two can be separated, in its rhetoric—the decision speaks of the potential of democracy, the role of free expression in realizing that potential, the corresponding threat such expression may pose to those wielding power. At the same time, the decision speaks *to* the widest possible audience—not to the press, as in so many of the Court's libel cases, but to the American public. It reminds us of the kind of public discourse we should aspire to, as well as of what we must tolerate to attain it. *Sullivan* goes only part of the way toward solving particular cases and problems; in the field where it has been most studiously applied, it has produced a mixed bag of consequences. But at the most general level—as a statement of enduring principle addressed to the American people—it is indeed a marvel.

40. Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 374–77 (1927) (Brandeis, J., concurring); United States v. Schwimmer, 279 U.S. 644, 653–55 (1929) (Holmes, J., dissenting).
41. Near v. Minnesota, 283 U.S. 697 (1931).
42. Grosjean v. American Press Co., 297 U.S. 233 (1936).
43. Bridges v. California, 314 U.S. 252 (1941).
44. Bond v. Floyd, 385 U.S. 116 (1966).
45. Brandenburg v. Ohio, 395 U.S. 444 (1968).
46. Cohen v. California, 403 U.S. 15 (1971).
47. New York Times Co. v. United States, 403 U.S. 713 (1971).
48. Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

And here lies the ultimate value of Lewis's work as well. In *Make No Law*, Lewis sometimes fails to discriminate among different kinds of First Amendment problems, to explore as deeply as he might the range of considerations involved in particular free speech controversies. But as an expounder of broad principle, he has few, if any, peers. And perhaps it is more important that the broad audience he is addressing have a deep commitment to the principle than a subtle understanding of the ways it can be applied or a fine appreciation of its limits. Like *Sullivan* itself, Lewis's work bears more than a passing resemblance to a morality play. Which is to say that although neither tells us everything, both instruct us as to what is most important.

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Confirmation Messes, Old and New

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REVIEW

Confirmation Messes, Old and New

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The Confirmation Mess. Stephen L. Carter. Basic Books, 1994. Pp xiii, 252.

What confirmation mess?

Stephen Carter's new book decries the state of the confirmation process, especially for Supreme Court nominees. "The confirmation mess," in Carter's (noninterrogatory) phrase, consists of both the brutalization and the politicization of the process by which the nation selects its highest judges. That process, Carter insists, is replete with meanness, dishonesty, and distortion. More, and worse, it demands of nominees that they reveal their views on important legal issues, thus threatening to limit the Court "to people who have adequately demonstrated their closed-mindedness" (p xi). A misguided focus on the results of controversial cases and on the probable voting patterns of would-be Justices, Carter argues, produces a noxious and destructive process. Carter's paradigm case, almost needless to say, is the failed nomination of Robert Bork.

But to observers of more recent nominations to the Supreme Court, Carter's description must seem antiquated. President

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Clinton's nominees, then-Judges Ruth Bader Ginsburg and Stephen Breyer, confronted no unfair or nasty opposition; to the contrary, their confirmation hearings became official lovefests. More important, both nominees felt free to decline to disclose their views on controversial issues and cases. They stonewalled the Judiciary Committee to great effect, as senators greeted their "nonanswer" answers with equanimity and resigned good humor. And even before the confirmation process became quite so cozy (which is to say, even before the turn toward nominating well-known and well-respected moderates), the practice to which Carter most objects—the discussion of a nominee's views on legal issues—had almost completely lapsed. Justices Kennedy, Souter, and Thomas, no less than Justices Ginsburg and Breyer, rebuffed all attempts to explore their opinions of important principles and cases. Professor Carter, it seems, wrote his book too late. Where, today, is the confirmation mess he laments?

The recent hearings on Supreme Court nominees, though, suggest another question: might we now have a distinct and more troubling confirmation mess? If recent hearings lacked acrimony, they also lacked seriousness and substance. The problem was the opposite of what Carter describes: not that the Senate focused too much on a nominee's legal views, but that it did so far too little. Otherwise put, the current "confirmation mess" derives not from the role the Senate assumed in evaluating Judge Bork, but from the Senate's subsequent abandonment of that role and function. When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public. Whatever imperfections may have attended the Bork hearings pale in comparison with these recent failures. Out, then, with the new mess and in with the old![1]

I. CARTER'S CRITIQUE

Carter depicts a confirmation process out of control—a process in which we attend to the wrong things in the wrong manner, in which we abjure reasoned dialogue about qualifications in favor of hysterical rantings about personalities and politics. Car-

[1] And no, I haven't changed my mind since, several months after I drafted this Review, the Senate turned Republican and Orrin Hatch assumed the chairmanship of the Judiciary Committee. The conclusion of this Review still holds—even if I am no longer quite so sanguine about it.

ter is no partisan in this description; he blames Republicans and Democrats, right and left alike (pp 10, 142). Similarly, Carter takes no sides as between the President and the Senate; he assumes that both ought to evaluate judicial candidates by the same criteria and argues that both have performed poorly this evaluative function (pp 29-30). Carter views the current mess as having deep roots. He refers often to the attempt of segregationist senators to defeat the nomination of Thurgood Marshall (pp 62-63) and describes as well some yet more distant confirmation battles (pp 65-73). Although he focuses on the nomination and confirmation of Supreme Court Justices, he buttresses his case with discussion of the recent travails of Lani Guinier (pp 37-44) and Zoe Baird (pp 25-28). Always, though, the face in the foreground is Robert Bork's. Carter's understanding of the Bork hearings informs—sometimes explicitly, sometimes not—the whole of his argument and analysis.

Carter identifies two cardinal flaws in the confirmation process. The first concerns the absence of "honesty" and "decency" (p ix). Here Carter laments the deterioration of public debate over nominations into "the intellectual equivalent of a barroom brawl" (p x). He catalogues the ways in which opponents demonize nominees and distort their records, referring to the many apparently purposeful misreadings of the writings of Robert Bork (pp 45-52) and Lani Guinier (pp 39-44). He describes the avid search for disqualifying factors, whether of a personal kind (for example, illegal nannies) or of a professional nature (for example, ill-conceived footnotes in scholarly articles) (pp 25, 42-43). He deplores "smears" and "soundbites" (p 206)—the way in which media coverage turns nominations into extravaganzas, the extent to which public relations strategy becomes all-important. And in a semi-mystical manner, he castigates our refusal to forgive sin, accept redemption, and acknowledge the complexity of human beings, including those nominated to high office (pp 183-84).

The second vice of the confirmation process, according to Carter, lies in its focus on a nominee's probable future voting record. In Carter's portrayal, the President, Senate, press, interest groups, and public all evaluate nominees primarily by plumbing their views on controversial legal issues, such as the death penalty or abortion (pp 54-56). Carter's paradigmatic case, again, is Robert Bork, a judge of superior objective qualifications whose views on constitutional method and issues led to the defeat of his nomination. Carter is "struck" by the failure of participants in the Bork hearings to consider "that trying to get him to tell the

nation how he would vote on controversial cases if confirmed might pose a greater long-run danger to the Republic than confirming him" (p x). This danger, Carter avers, arises from the damage such inquiry does to judicial independence. Examination of a nominee's views on contested constitutional matters, Carter claims, gives the public too great a chance to influence how the judiciary will decide these issues, precisely by enabling the public to reject a nominee on grounds of substance (p 115). At the same time, such inquiry undermines the eventual Justice's ability (and the public's belief in the Justice's ability) to decide cases impartially, based on the facts at issue and the arguments presented, rather than on the Justice's prior views or commitments (p 56).

The failures of the confirmation process, Carter urges, ultimately have less to do with rules and procedures than with public "attitudes"—specifically, "our attitudes toward the Court as an institution and the work it does for the society" (p 188). We view the Court as a dispenser of decisions—as to individual cases of course, but also as to hotly disputed public issues. Our evaluation of the Court coincides with our evaluation of the results it reaches (p 57). Because we see the Court in terms of results, we yearn to pack it with Justices who will always arrive at the "right" decisions. And because the decisions of the Court indeed have consequence, we feel justified, as we pursue this project, in resorting to "shameless exaggeration" and misleading rhetoric (p 51). The key to change, according to Carter, lies in viewing the Court in a different—a more "mundane and lawyerly"—manner (p 206). And although Carter is unclear on the point, this seems to mean judging the Court less in terms of the results it reaches than in terms of its level of skill and craftsmanship.

In keeping with this analysis, Carter advocates a return to confirmation proceedings that focus on a nominee's technical qualifications—in other words, his legal aptitude, skills, and experience (pp 161-62). At times, Carter suggests that this set of qualifications constitutes the only proper criterion of judgment (pp 187-88). But Carter in the end draws back from this position, which he admits would provide no lever to oppose a nominee, otherwise qualified, who wished to overturn a case like *Brown v Board*[2] (pp 119-21). Carter urges, as a safeguard against extremism of this kind, an inquiry into whether a nominee subscribes to the "firm moral consensus" of society (p 121). The Senate, Carter writes, should resolve this question by "undertak[ing] moral

[2] *Brown v Board of Education*, 347 US 483 (1954).

inquiry, both into the world view of the nominee and, if necessary, into the nominee's conduct" (p 124). This inquiry, in other words, would involve a determination of whether a nominee has the "right moral instincts" and whether his "personal moral decisions seem generally sound" (p 152). Carter views this inquiry as wholly distinct from an approach that asks about a nominee's legal views or philosophy (id). He suggests, for example, that the Senate ask a nominee not whether discriminatory private clubs violate the Constitution, but whether "the nominee has belonged to a club with such policies" (id). An assessment of moral judgment alone, independent of legal judgment, would combine with an evaluation of legal aptitude to form Carter's ideal confirmation process.

II. CURRENT EVENTS

Does Carter's critique of the confirmation process ring true? It might have done so eight years ago. It ought not to do so now.

Carter tries to update his book, to make it more than a comment on the Bork proceedings. He invokes the nomination, eventually withdrawn, of Lani Guinier to serve as Assistant Attorney General for Civil Rights (pp 37-44). Consider, Carter implores us, the distortion of Guinier's academic work, initially by her many enemies, finally and fatally by some she thought friends. Do not the exaggeration, name-calling, and hyperbole that surrounded the discussion of Guinier's views prove the existence of a confirmation mess? And Carter then invokes the battle over the nomination of Clarence Thomas to serve as a Supreme Court Justice (pp 138-42). Recall, Carter tells us (and it is not hard to do), the intensity and wrath surrounding that battle—the fury with which the partisans of Thomas and Anita Hill, respectively, exchanged charge and countercharge and bloodied previously unsullied reputations. Does not this episode, this display of raw emotion and this unrelenting focus on personal traits and behavior, demonstrate again the existence of a confirmation mess?

Well, no—not on either count, at least if the term "confirmation mess" signifies a problem both specific to and common among confirmation battles. Carter is right to note the distortions in the debate over Guinier's prior writings; but he is wrong to think they derived from a special attribute of the confirmation process. It is unfortunate but true that distortions of this kind mar public debate on all important issues. Professor Carter, meet Harry and Louise; they may convince you that the Guinier episode is less a part of a confirmation mess than of a government

mess, the sources and effects of which lie well beyond your book's purview. And the Thomas incident, proposed as exemplar or parable, suffers from the converse flaw. That incident is unique among confirmation hearings and, with any reasonable amount of luck, will remain so. The way the Senate handled confidential charges of a devastating nature on a subject at a fault line of contemporary culture reveals very little about the broader confirmation process.

Indeed, Carter's essential critique of the confirmation process—that it focuses too much on the nominee's views on disputed legal issues—applies neither to the Guinier episode nor to the Thomas hearings. Carter concedes that the Senate ought to inquire into the views and policies of nominees to the executive branch, for whom "independence" is no virtue (p 32). The public debate over Guinier's articles (problems of distortion to one side) thus fails to implicate Carter's concern with the focus of the process on legal issues. And so too of the Thomas hearings. Carter's own description of the "mess" surrounding that nomination highlights the Senate's inquiry into the charges of sexual harassment and not its investigation of the nominee's legal opinions (pp 133-45). The emphasis is not surprising. No one can remember the portion of the hearings devoted to Justice Thomas's legal views, and for good reason: Justice Thomas, or so he assured us, already had "stripped down like a runner" and so had none to speak of.[3] The apparent "mess" of the Thomas hearings thus arose not from the exploration of legal philosophy that Carter abjures, but instead from the inquiry into moral practice and principle that he recommends to the Senate as an alternative.[4]

What, then, of the "confirmation mess" as Carter defines it—the threat to judicial independence resulting from a misplaced focus on the nominee's legal views and philosophy? Lacking support for his argument in the recent controversies surrounding Guinier and Thomas, Carter must recede to the Bork hearings for a paradigm. But time has overtaken this illustration: no subsequent nomination fits Carter's Bork-based model

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[3] Clarence Thomas, as quoted in Linda Greenhouse, *The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Questions of What He Is*, NY Times A19 (Sept 13, 1991).

[4] The same is true of the controversy surrounding the nomination of Zoe Baird as Attorney General. As Carter discusses, Baird's nomination ran into trouble because she had hired illegal immigrants and then failed to pay social security taxes on their salaries (pp 25-28). Here, too, the dispute arose from an inquiry into the nominee's personal conduct, rather than her views and policies.

any better than do the nominations of Guinier or Thomas. Not since Bork (as Carter himself admits) has any nominee candidly discussed, or felt a need to discuss, his or her views and philosophy (pp 57-59). It is true that in recent hearings senators of all stripes have proclaimed their prerogative to explore a nominee's approach to constitutional problems. The idea of substantive inquiry is accepted today to a far greater extent than it was a decade ago.[5] But the practice of substantive inquiry has suffered a precipitous fall since the Bork hearings, so much so that today it hardly deserves the title "practice" at all. To demonstrate this point, it is only necessary to review the recent hearings of Ruth Bader Ginsburg and Stephen Breyer—one occurring before, the other after, publication of Carter's book. Consider the way these then-judges addressed issues of substance and then ask of what Carter's "confirmation mess" in truth consists.

Justice Ginsburg's favored technique took the form of a pincer movement. When asked a specific question on a constitutional issue, Ginsburg replied (along Carter's favored lines) that an answer might forecast a vote and thus contravene the norm of judicial impartiality. Said Ginsburg: "I think when you ask me about specific cases, I have to say that I am not going to give an advisory opinion on any specific scenario, because . . . that scenario might come before me."[6] But when asked a more general question, Ginsburg replied that a judge could deal in specifics only; abstractions, even hypotheticals, took the good judge beyond her calling. Again said Ginsburg: "I prefer not to . . . talk in grand terms about principles that have to be applied in concrete cases. I like to reason from the specific case."[7] Some room may have remained in theory between these two responses; perhaps a senator could learn something about Justice Ginsburg's legal

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[5] Senator Joseph Biden made this point near the beginning of the Ginsburg hearings. After listening, in turn, to Senators Hatch, Kennedy, Metzenbaum, and Simpson expound on the need to question the nominee about her judicial philosophy, Senator Biden said: "I might note it is remarkable that seven years ago the hearing we had here was somewhat more controversial, and I made a speech that mentioned the 'p' word, philosophy, that we should examine the philosophy, and most . . . said that was not appropriate. At least we have crossed that hurdle. No one is arguing that anymore." Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary, 103d Cong, 1st Sess 21 (July 20-23, 1993) ("Confirmation Hearings for Ginsburg").

[6] Id at 184.

[7] Id at 180. See also id at 333 ("I can't answer an abstract issue. I work from a specific case based on the record of that case, the briefs that are presented, the parties' presentations, and decide the case in light of that record, those briefs. I simply cannot, even in areas that I know very well, answer an issue abstracted from a concrete case.").

views if he pitched his question at precisely the right level of generality. But in practice, the potential gap closed to a sliver given Ginsburg's understanding of what counted as "too specific" (roughly, anything that might have some bearing on a case that might some day come before the Court) and what counted as "too general" (roughly, anything else worthy of mention).

So, for example, in a colloquy with Senator Feinstein on the Second Amendment, Ginsburg first confronted the question whether she agreed with a fifty-four-year-old Supreme Court precedent[8] on the subject and with the interpretation that lower courts unanimously had given it. Replied Ginsburg: "The last time the Supreme Court spoke to this question was 1939. You summarized what that was, and you also summarized the state of law in the lower courts. But this is a question that may well be before the Court again . . . and because of where I sit it would be inappropriate for me to say anything more than that."[9] The Senator continued: if the Judge could not discuss a particular case, even one decided fifty years ago, could the Judge say something about "the methodology [she] might apply" and "the factors [she] might look at" in determining the validity of that case or the meaning of the Second Amendment?[10] "I wish I could Senator," Ginsburg replied, "but . . . apart from the specific context I really can't expound on it."[11] "Why not?" the Senator might have asked. Because the question functioned at too high a level of abstraction: "I would have to consider, as I have said many times today, the specific case, the briefs and the arguments that would be made."[12] Many times indeed. So concluded a typical exchange in the confirmation hearing of Justice Ginsburg.

Justice Breyer was smoother than Justice Ginsburg, but ultimately no more forthcoming. His favored approach was the "grey area" test: if a question fell within this area—if it asked him to comment on issues not yet definitively closed (and therefore still a matter of interest)—he must, he said, decline to comment.[13] Like Justice Ginsburg, he could provide personal anec-

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[8] *United States v Miller*, 307 US 174 (1939).

[9] Confirmation Hearings for Ginsburg at 241-42 (cited in note 5).

[10] Id at 242.

[11] Id.

[12] Id.

[13] Confirmation Hearings for Stephen G. Breyer to be an Associate Justice of the United States Supreme Court, Senate Committee on the Judiciary, 103d Cong, 2d Sess 85 (July 12, 1994) (Miller Reporting transcript). Sometimes Justice Breyer referred to this test as the "up in the air" test. So, for example, when Chairman Biden asked him to comment on the burden imposed on the government to sustain economic regulation,

dotes—the relevance of which were open to question. He could state settled law—but not whether he agreed with the settlement. He could explain the importance and difficulty of a legal issue—without suggesting which important and difficult resolution he favored. What he could not do was to respond directly to questions regarding his legal positions. Throughout his testimony, Breyer refused to answer not merely questions concerning pending cases, but questions relating in any way to any issue that the Supreme Court might one day face.

I do not mean to overstate the case; Justice Ginsburg and Justice Breyer did provide snippets of information. Both Justices discussed with candor and enthusiasm issues on which they previously had written. So the Judiciary Committee and public alike learned much about Justice Ginsburg's current views on gender discrimination and abortion and about Justice Breyer's thoughts on regulatory policy. Both Justices, too, allowed an occasional glimpse of what might be termed, with some slight exaggeration, a judicial philosophy. A close observer of the hearings thus might have made a quick sketch of Justice Ginsburg as a cautious, incrementalist common lawyer and of Justice Breyer as an antiformalist problem solver. (But how much of this sketch in fact would have derived from preconceptions of the Justices, based on their judicial opinions and scholarly articles?) If most of the testimony disclosed only the insignificant and the obvious—did anyone need to hear on no less than three separate occasions that Justice Ginsburg disagreed with *Dred Scott*?[14]—a small portion revealed something of the nominee's conception of judging.

Neither do I mean to deride Justices Ginsburg and Breyer for the approach each took to testifying. I am sure each believed (along with Carter) that disclosing his or her views on legal issues threatened the independence of the judiciary. (It is a view, I suspect, which for obvious reasons is highly correlated with membership in the third branch of government.[15]) More, I am sure

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Breyer noted that "this is a matter . . . still up in the air." When the Chairman replied "[t]hat is why I am trying to get you to talk about it, because you may bring it down to the ground," Justice Breyer repeated that "I have a problem talking about things that are up in the air." Id at 55 (July 12, 1994).

[14] *Dred Scott v Sanford*, 60 US 393 (1856). See, for example, Confirmation Hearings for Ginsburg at 126, 188, 270 (cited in note 5).

[15] In 1959, lawyer William Rehnquist wrote an article criticizing the Senate's consideration of the nomination of Charles Evans Whittaker to the Supreme Court. The Senate, he stated, had "succeeded in adducing only the following facts: . . . proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; . . . he was the

both judges knew that they were playing the game in full accordance with a set of rules that others had established before them. If most prior nominees have avoided disclosing their views on legal issues, it is hard to fault Justice Ginsburg or Justice Breyer for declining to proffer this information. And finally, I suspect that both appreciated that, for them (as for most), the safest and surest route to the prize lay in alternating platitudinous statement and judicious silence. Who would have done anything different, in the absence of pressure from members of Congress?

And of such pressure, there was little evidence. To be sure, an occasional senator complained of the dearth of substantive comment, most vocally during the preternaturally controlled testimony of Justice Ginsburg. Chairman Biden and Senator Spector in particular expressed impatience with the game as played. Spector warned that the Judiciary Committee one day would "rear up on its hind legs" and reject a nominee who refused to answer questions, for that reason only (p 54). And Biden lamented that no "nominee would ever satisfy me in terms of being as expansive about their views as I would like."[16] But for the most part, the senators acceded to the reticence of the nominees before them with good grace and humor. Senator Simon sympathetically commented to Justice Breyer: "You are in a situation today . . . where you do not want to offend any of us, and I understand that. I hope the time will come when you may think it appropriate . . . to speak out on this issue."[17] Senator DeConcini similarly remarked to Justice Ginsburg that it was "fun" and "intellectually challenging"—a sort of chess game in real life—for a senator to "try[ ] to get inside the mind of a nominee . . . without violating their oath and their potential conflicts . . . ."[18] And of course no one voted against either nominee

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first Missourian ever appointed to the Supreme Court; [and] since he had been born in Kansas but now resided in Missouri, his nomination honored two states." William Rehnquist, *The Making of a Supreme Court Justice*, Harv L Rec 7, 8 (Oct 8, 1959). Rehnquist specifically complained about the Senate's failure to ask Justice Whittaker about his views on equal protection and due process. Id at 10. By 1986, when he appeared before the Senate Judiciary Committee as a sitting Associate Justice and a nominee for Chief Justice, Rehnquist had changed his mind about the propriety of such inquiries.

[16] Confirmation Hearings for Ginsburg at 259 (cited in note 5). In a similar vein, Senator Cohen accused Justice Ginsburg of resorting to "delphic ambiguity" in her responses. Senator Cohen recalled the story of the general who asked the oracle what would occur if he (the general) invaded Greece. When the oracle responded that a great army would fall, the general mounted the invasion—only to discover that the great army to which the oracle had referred was his own. See id at 220.

[17] Confirmation Hearings for Breyer at 77-78 (July 13, 1994) (cited in note 13).

[18] Confirmation Hearings for Ginsburg at 330 (cited in note 5).

on the ground that he or she had declined to answer questions relating to important legal issues.

The ease of these proceedings in part reflected the nature of both the nominations and the political context. First replace divided government with single-party control of the White House and Senate. Now posit a President with an ambitious legislative agenda, requiring him to retain support in Congress, but with no judicial agenda to speak of.[19] Assume, as a result, that this President nominates two clear moderates, known and trusted by leading senators of both the majority and the minority parties. Throw in that each nominee is a person of extraordinary ability and distinction. Finally, add that the Court's rulings on some of the hot-button issues of recent times—most notably abortion, but also school prayer and the death penalty—today seem relatively stable. This is a recipe—now proved successful—for confirmation order, exactly opposite to the state of anarchy depicted by Carter. At the least, this suggests what David Strauss has argued in another review of Carter's book:[20] that the culprit in Carter's story is nothing so grand and seemingly timeless as the American public's attitudes toward the courts; that the cause of Carter's "mess" is the simple attempt of the Reagan and Bush administrations to impose an ideologically charged vision of the judiciary in an unsympathetic political climate.

But even this view overstates the longevity of the "confirmation mess," as Carter defines it. That so-called mess in fact ended long before President Clinton's nominations; it ended right after it began, with the defeat of the nomination of Robert Bork. The Senate overwhelmingly approved the nominations of Justices Kennedy and Souter after they gave testimony (or rather, nontestimony) similar in almost all respects to that of Justices Ginsburg and Breyer.[21] This was so even though the Senate knew little about Justice Kennedy and still less about Justice

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[19]. See David A. Strauss, *Whose Confirmation Mess?*, Am Prospect 91, 96 (Summer 1994), reviewing Carter, *The Confirmation Mess*. Herein lies one of the mysteries of modern confirmation politics: given that the Republican Party has an ambitious judicial agenda and the Democratic Party has next to none, why is the former labeled the party of judicial restraint and the latter the party of judicial activism?

[20] Id at 92, 95-96.

[21] Prior to nominating Justice Kennedy, the Reagan White House nominated Judge Douglas Ginsburg, only soon to withdraw the nomination. The decision to pull the nomination followed revelations about Judge Ginsburg's prior use of marijuana. Carter barely mentions this nomination. Carter, however, generally considers the prior illegal conduct of a nominee to be a meet subject for investigation, although not necessarily a sufficient reason for disqualification (pp 169-77).

Souter prior to the hearings—an ignorance which should have increased the importance of their testimony. (Just ask Senator Hatch whether he now wishes he had insisted that Justice Souter be more forthcoming.) The Senate also confirmed the nomination of Justice Thomas after his substantive testimony had become a national laughingstock. Take away the weakness of Justice Thomas's objective qualifications and the later charges of sexual harassment (inquiry into which Carter approves), and the Justice's Pinpoint, Georgia, testimonial strategy would have produced a solid victory.[22] This history offers scant support for Carter's lamentation that the confirmation process has become focused on a nominee's substantive testimony and obsessed with the nominee's likely voting record. So what, excepting once again Robert Bork, is Carter complaining about?

If Carter is right as to what makes a "confirmation mess," he had no reason to write this book—or at least to write it when he did. Senators today do not insist that any nominee reveal what kind of Justice she would make, by disclosing her views on important legal issues. Senators have not done so since the hearings on the nomination of Judge Bork. They instead engage in a peculiar ritual dance, in which they propound their own views on constitutional law, but neither hope nor expect the nominee to respond in like manner. Under Carter's criteria, this process ought to count as nothing more than a harmless charade, not as a problem of any real import. It is only if Carter's criteria are wrong—only if the hearings on Judge Bork ought to serve less as a warning than as a model—that we now may have a mess to clean up.

III. CRITIQUING CARTER

What, then, of Carter's vision of the confirmation process? Should participants in the process accede to Carter's view of how to select a Supreme Court Justice? Or should they adopt a different, even an opposite, model?

One preliminary clarification is necessary: Carter's argument

[22] The margin of victory would have increased yet further had Thomas not made controversial statements, before his nomination, on subjects such as abortion and affirmative action. Carter is unclear as to whether (or how) participants in the confirmation process ought to take account of such prenomination statements. If Carter does approve of an evaluation of the substantive views expressed by a nominee in prior speeches or writings, then virtually all of the votes cast against Justice Thomas would have derived from the consideration of factors that Carter himself deems relevant to the process.

against a Bork-like confirmation process focuses entirely on the scope of the inquiry, not at all on the identity (executive or legislative) of the inquirer. This is an important point because other critics of the Bork hearings have rested their case on a distinction between the roles of the President and the Senate; they have argued that in assessing the substantive views of the nominee, the Senate ought to defer to the President.[23] Carter (I think rightly) rejects this claim, adopting instead the position that the Senate and the President have independent responsibility to evaluate, by whatever criteria are appropriate, whether a person ought to serve as a Supreme Court Justice.[24] Carter's argument concerns the criteria that the participants—that is, all the participants—in the confirmation process ought to use to make this decision. It is thus Carter's contention not merely that the Senate ought to forgo inquiry into a nominee's legal views and philosophy, but also that the President ought to do so—in short, that such inquiry, by whomever conducted, crosses the bounds of propriety. (And although Carter does not address the issue, his arguments apply almost equally well to an investigation of the views expressed in a person's written record as to an inquiry into the person's views by means of an oral examination.)

This analysis raises some obvious questions. If substantive inquiry is off-limits, on what basis will the President and Senate exercise their respective roles in the appointments process? Will this limited basis prove sufficient to evaluate and determine whether a nominee (or would-be nominee) should sit on the Court? Will an inquiry conducted on this basis appropriately educate and engage the public as to the Court's decisions and functions? Some closer exploration of Carter's views, as they relate to this set of issues, will illustrate at once the inadequacy of his proposals and the necessity for substantive inquiry of nominees, most notably in Senate hearings.

Carter argues that both the President and the Senate ought to pay close attention to a nominee's (or a prospective nominee's)

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[23] See, for example, John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 Tex L Rev 633, 636, 653-54 (1993).

[24] This position has become common in the literature on the confirmation process. See David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 Yale L J 1491 (1992). See also Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L J 657 (1970). Because Carter and I agree on the issue, and because the relevant arguments have been stated fully elsewhere, this Review addresses the issue only indirectly.

objective qualifications. There may be, as Carter notes, some disagreement as to what these are (pp 161-62). Must, for example (as Carter previously has argued[25]), a nominee have served on another appellate court—or may (as I believe) she demonstrate the requisite intelligence and legal ability through academic scholarship, the practice of law, or governmental service of some other kind? Carter writes that we must form a consensus on these issues and then rigorously apply it—so that the Senate, for example, could reject a nomination on the simple ground that the nominee lacks the qualifications to do the job (p 162). On this point, Carter surely is right. It is an embarrassment that the President and Senate do not always insist, as a threshold requirement, that a nominee's previous accomplishments evidence an ability not merely to handle but to master the "craft" aspects of being a judge. In this respect President Clinton's appointments stand as models. No one can say of his nominees, as no one ought to be able to say of any, that they lack the training, skills, and aptitude to do the work of a judge at the highest level.

But Carter cannot think—and on occasion reveals he does not think—that legal ability alone ought to govern, or as a practical matter could govern, either the President's or the Senate's decision. If there was once a time when we all could agree on the single "best" nominee—as, some say, all agreed on Cardozo—that time is long past, given the nature of the work the Supreme Court long has accomplished. As Carter himself concedes, most of the cases the Supreme Court hears require more than the application of "mundane and lawyerly" skills; these cases raise "questions requir[ing] judgment in the finding of answers, and in every exercise of interpretive judgment, there comes a crucial moment when the interpreter's own experience and values become the most important data" (p 151). Carter offers as examples flag burning, segregated schools, and executive power (p 151), and he could offer countless more; it should be no surprise by now that many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value. Imagine our response if President Clinton had announced that he had chosen his most recent nominee to the Supreme Court by conducting a lottery among Richard Posner, Stephen Breyer, and Laurence Tribe because they seemed to him the nation's three smartest lawyers. If we are all realists now, as the saying goes, it is in the sense that we understand a choice among

[25] See Stephen Carter, *The Confirmation Mess*, 101 Harv L Rev 1185, 1188 (1988).

these three to have large consequences and that we would view a lottery among them as demonstrating a deficient understanding of the judicial process.

Carter recommends, in light of the importance of a judge's values, that the President and Senate augment their inquiry into a person's legal ability with an investigation of the person's morality. He says that "[t]he issue, finally, is . . . what sort of person the nominee happens to be" (p 151); and he asks the President and Senate to determine whether a person "possess[es] the right moral instincts" by investigating whether her "personal moral decisions seem generally sound" (p 152). Here, too, it is easy to agree with Carter that this trait ought to play some role in the appointments process. Moral character, and the individual acts composing it, matter for two reasons (although Carter does not disentangle them). First, elevating a person who commits acts of personal misconduct (for example, sexual harassment) to the highest legal position in the nation sends all the wrong messages about the conduct that we as a society value and honor. Second, moral character, as Carter recognizes, sometimes will be "brought to bear on concrete cases," so that "the morally superior individual" may also "be the morally superior jurist," in the sense that her decisions will have a "salutary rather than destructive effect on the Court and the country" (p 153).

But focusing the confirmation process on moral character (even in conjunction with legal ability) would prove a terrible error. For one thing, such a focus would aggravate, rather than ease, the meanness that Carter rightly sees as marring the confirmation process (and, one might add, much of our politics). The "second" hearing on Clarence Thomas ought to have taught at least that lesson. When the subject is personal character, rather than legal principle, the probability, on all sides, of using gutter tactics exponentially increases. There are natural limits on the extent to which debate over legal positions can become vicious, hurtful, or sordid—but few on the extent to which discussion of personal conduct can descend to this level.

More important, an investigation of moral character will reveal very little about the values that matter most in the enterprise of judging. What makes the Richard Posner different from the Stephen Breyer different from the Laurence Tribe is not moral character or behavior, in the sense meant by Carter; I am reasonably sure that each of these persons is, in his personal life and according to Carter's standard, a morally exemplary individual. What causes them to differ as constitutional interpreters is

something if not completely, then at least partly, severable from personal morality: divergent understandings of the values embodied in the Constitution and the proper role of judges in giving effect to those values. Disagreement on these matters can cause (and has caused), among the most personally upright of judges, disagreement on every concrete question of constitutional law, including (or especially) the most important. It is therefore difficult to understand why we would make personal moral standards the focal point of a decision either to nominate or to confirm a person as a Supreme Court Justice.[26]

What must guide any such decision, stated most broadly, is a vision of the Court and an understanding of the way a nominee would influence its behavior. This vision largely consists of a view as to the kinds of decisions the Court should issue. The critical inquiry as to any individual similarly concerns the votes she would cast, the perspective she would add (or augment), and the direction in which she would move the institution.[27] I do not mean to say that the promotion of "craft values"—the building of a Court highly skilled in legal writing and reasoning and also finely attuned to pertinent theoretical issues—is at all unimportant. Justice Scalia by now has challenged and amused a decade's worth of law professors, which is no small thing if that is your profession; more seriously, the quality and intelligence (even if ultimate wrong-headedness) of much of Justice Scalia's work has instigated a debate that in the long run can only advance legal inquiry. But the bottom-line issue in the appointments process must concern the kinds of judicial decisions that will serve the country and, correlatively, the effect the nominee will have on the Court's decisions. If that is too results oriented

[26] It is also true that a person may engage in immoral behavior without allowing that immorality to influence his judicial decision making. Our government is replete with womanizers who always vote in sympathy with the goal of sexual equality; our Court has seen a former Ku Klux Klan member who well understood the constitutional evil of state-imposed racism. Perhaps the (im)moral conduct in these cases is all that matters; perhaps, in any event, we ought to rely on the (im)moral conduct as a solid, even if not a foolproof, indicator of future judicial behavior. But consideration of these cases may increase further our reluctance to make moral character the critical determinant of confirmation decisions.

[27] The President and Senate thus ought to evaluate the nominee (or potential nominee) in the context of the larger institution she would join if confirmed. They are not choosing a judge who will staff the Supreme Court alone; they are choosing a judge who will act and interact with eight other members. The qualities desirable in a nominee may take on a different cast when this fact is remembered. Most obviously, the benefits of diversity of viewpoint become visible only when the nominee is viewed as just one member of a larger body.

in Carter's schema, so be it—though even he notes that a critical question is whether the Court's decisions will have a "salutary" or a "destructive" impact on the country (p 153). It is indeed hard to know how to evaluate a governmental institution, or the individuals who compose it, except by the effect of their actions (or their refusals to take action) on the welfare of society.

If this is so, then the Senate's consideration of a nominee, and particularly the Senate's confirmation hearings, ought to focus on substantive issues; the Senate ought to view the hearings as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct. Like other kinds of legislative fact-finding, this inquiry serves both to educate members of the Senate and public and to enhance their ability to make reasoned choices. Open exploration of the nominee's substantive views, that is, enables senators and their constitutuents to engage in a focused discussion of constitutional values, to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires. These are the issues of greatest consequence surrounding any Supreme Court nomination (not the objective qualifications or personal morality of the nominee); and the process used in the Senate to serve the intertwined aims of education and evaluation ought to reflect what most greatly matters.[28] At least this is true in the absence of any compelling reasons, of prudence or propriety, to the contrary; later I will argue, as against Carter, that such reasons are nowhere evident.

The kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues. By "judicial philosophy" (a phrase Carter berates without explanation), I mean such things as the judge's understanding of the role of courts in our society, of the nature of and values embodied in our Constitution, and of the proper tools and techniques of interpretation, both constitutional and statutory. A nominee's views on these matters could prove quite revealing: contrast, for example, how Antonin Scalia and Thurgood Marshall would have answered these queries, had either decided (which neither did) to

[28] To structure the process to avoid these issues would be akin to enacting a piece of legislation without trying to figure out or explain the legislation's principal consequences. I presume that no one would commend such an approach generally to Congress.

share his thoughts with the Senate. But responses to such questions can—and have—become platitudinous, especially given the interrogators' scant familiarity with jurisprudential matters.[29] And even when a nominee avoids this vice, her statements of judicial philosophy may be so abstract as to leave uncertain, especially to the public, much about their real-world consequences. Hence the second aspect of the inquiry: the insistence on seeing how theory works in practice by evoking a nominee's comments on particular issues—involving privacy rights, free speech, race and gender discrimination, and so forth—that the Court regularly faces. It is, after all, how the Court functions with respect to such issues that makes it, in Carter's words, either a "salutary" or a "destructive" institution.

A focus on substance in fact would cure some of the deficiencies in the confirmation process that Carter pinpoints. Carter says that the process turns "tiny ethical molehills into vast mountains of outrage" (p 8)—and he is right that we have seen these transformations. To note but one example, the amount of heat generated by a few senators (and the New York Times) concerning Justice Breyer's recusal practices far exceeded the significance of the issue. But this occurs precisely because we have left ourselves with nothing else to talk about. Rather than feeling able to confront directly the question whether Justice Breyer was too moderate, Senator Metzenbaum (and likewise the New York Times) fumed about an issue not nearly so important, either to them or to the public. Carter also says that participants in the process have attempted to paint nominees (particularly Judge Bork) as "radical monster[s]—far outside the mainstream of both morality and law" (p 127). But assuming, as seems true, that senators and others at times have engaged in distortion—it would be surprising if they hadn't—the marginalization of substantive inquiry that Carter favors only would encourage this practice. If evaluating (and perhaps rejecting) a nominee on the

[29] Carter often takes senators to task for failing to question nominees on constitutional theory with the appropriate level of sophistication and nuance. Although there is some truth to this criticism, it is mixed in Carter's account with a healthy measure of professorial condescension. Given the need to explain matters of constitutional theory to the public, at least a few senators do quite well. To the extent Carter's criticism has merit, the real problem is that senators now can expect answers only to high-blown questions of constitutional theory. Senators wander in the unfamiliar ground of constitutional theory because they cannot gain access to the real, and very familiar, world of decisions and consequences. See Robert F. Nagel, *Advice, Consent, and Influence*, 84 Nw U L Rev 858, 863 (1990) ("Senators are certainly qualified to consider the impact of the law's abstractions.").

basis of her substantive positions is appropriate only in the most exceptional cases, then the natural opponents of a nomination will have every incentive to—indeed, will need to—characterize the nominee as a "radical monster." The way to promote reasoned debate thus lies not in submerging substantive issues, but in making them the centerpiece of the confirmation process.

Further, a commitment to address substantive issues need not especially disadvantage scholars and others who have left a "paper trail," as the received wisdom intones and Carter accepts (p 38). The conventional view is that substantive inquiry promotes substantive ciphers; hence the hearings on Robert Bork led to the nomination of David Souter. But this occurs only because the cipher is allowed to remain so—only because substantive questioning is reserved for nominees who somehow have "opened the door" to it by once having committed a thought to paper. If questioning on substantive positions ever were to become the norm, the nominee lacking a publication record would have no automatic advantage over a highly prolific author. The success of a nomination in each case would depend on the nominee's views, whether or not previously expressed in a law review or federal reporter. Indeed, a confirmation process devoted to substantive inquiry might favor nominees with a paper trail, all else being equal. If there was any reason for the Senate to have permitted the testimonial demurrals of Justices Breyer and Ginsburg, it was that their views already were widely known, in large part through scholarship and reported opinions—and that those views were widely perceived as falling within the appropriate range. When this is so, extended questioning on legal issues may seem hardly worth the time and effort.[30] More available writing thus might lead to less required testimony in a confirmation process committed to substantive inquiry.

Finally, a confirmation process focused on substantive views usually will not violate, in the way Carter claims, norms of judi-

[30] The value of questioning in such circumstances is almost purely educative; the inquiry is a means not of discovering what the nominee thinks, in order to decide whether confirmation is warranted, but instead of conveying to members of the public what the nominee thinks, in order to give them both an understanding of the Court and a sense of participating in its composition. This function is itself important, see text accompanying note 28; it may provide a reason for holding substantive hearings even when senators can make, and have made, a decision as to a nominee's views prior to asking a single question (as senators could have and, for the most part, did about the views of Justices Breyer and Ginsburg). The need for such hearings, however, is much greater when (as was true for Justices Souter and Thomas) the prior record and writings of the nominee leave real uncertainty as to the nominee's legal philosophy.

cial impartiality or independence. Carter's "blank slate" notion of impartiality of judgment—"appointing Justices who make up their minds about how to vote before they hear any arguments rather than after is a threat," fusses Carter (p 56)—is an especial red herring. Judges are not partial in deciding cases because they have strong opinions, or previously have expressed strong opinions, on issues involved in those cases. If they were, the Supreme Court would have to place, say, Justice Scalia in a permanent state of recusal, given that in the corpus of his judicial opinions he has stated unequivocal views on every subject of any importance. And the Senate would have had to reject, on this ground alone, the nomination of Justice Ginsburg, who not only had written about abortion rights[31]—perhaps the most contentious issue in contemporary constitutional law—but who testified in even stronger terms as to her current views on that issue.[32] That both suggestions are absurd indicates that we do not yet, thankfully enough, consider either the possession or the expression of views on legal issues—even when strongly held and stated—to be a judicial disqualification.

As for "judicial independence," Carter speaks as though the term were self-defining—and as though it meant that in appointing judges to a court, the President and Senate must refrain from considering what they will do once they arrive there. But this would be an odd kind of decision to leave in the hands of elected officials: far better, if such subjects were forbidden, to allow judges to name their own successors—or to cede the appointment power to some ABA committee. In fact, the placement of this decision in the political branches says something about its nature—says something, in particular, about its connection to the real-world consequences of judicial behavior. Indeed, contrary to Carter's view, the President and Senate themselves have a constitutional obligation to consider how an individual, as a judge, will read the Constitution: that is one part of what it means to preserve and protect the founding instrument. The value of judicial independence does not command otherwise, however much Carter tries to convert this concept into a thought-suppressing mantra. The judicial independence that we should focus on protecting resides primarily in the inability of political officials, once having placed a person on a court, to interfere with what she

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[31] See, for example, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 NC L Rev 375 (1985).

[32] See, for example, Confirmation Hearings for Ginsburg at 268-69 (cited in note 5).

does there. That seems a fair amount of independence for any branch of government.

I do not mean to argue here that the President and Senate may ask, and a nominee (or potential nominee) must answer, any question whatsoever. Some kinds of questions, as Carter contends, do pose a threat to the integrity of the judiciary. Suppose, for example, that a senator asked a nominee to commit herself to voting a certain way on a case that the Court had accepted for argument. We would object—and we would be right to object—to this question, on the ground that any commitment of this kind, even though unenforceable, would place pressure on the judge (independent of the merits of the case) to rule in a certain manner. This would impede the judge's ability to make a free and considered decision in the case, as well as undermine the credibility of the decision in the eyes of litigants and the public. And once we accept the impermissibility of such a question, it seems we have to go still further. For there are ways of requesting and making commitments that manage to circumvent the language of pledge and promise, but that convey the same meaning; and these scantly veiled expressions pose dangers almost as grave as those of explicit commitments to the fairness, actual and perceived, of the judicial process.

But we do not have to proceed nearly so far down the road of silence as Carter and recent nominees would take us—to a place where comment of any kind on any issue that might bear in any way on any case that might at any time come before the Court is thought inappropriate.[33] There is a difference between a prohibition on making a commitment (whether explicit or implicit) and a prohibition on stating a current view as to a disputed legal question. The most recent drafters of the Model Code of Judicial Conduct acknowledged just this distinction when they adopted the former prohibition in place of the latter for candidates for judicial office.[34] Of course, there will be hard cases—cases in which reasonable people may disagree as to whether a nominee's statement of opinion manifests a settled intent to decide in a

[33] For a similar conclusion, see Steven Lubet, *Advice and Consent: Questions and Answers*, 84 Nw U L Rev 879 (1990).

[34] See pp 96-97. Compare Model Code of Judicial Conduct Canon 5(A)(3)(d) (1990), with Code of Judicial Conduct Canon 7(B)(1)(c) (1972). See generally *Buckley v Illinois Judicial Inquiry Board*, 997 F2d 224, 230 (7th Cir 1993) (Judge Posner noting the difference between these two kinds of prohibitions and holding the broader prohibition, on "announc[ing] . . . views on disputed legal or political issues," to violate the First Amendment).

particular manner a particular case likely to come before the Court. But many easy cases precede the hard ones: a nominee can say a great, great deal before making a statement that, under this standard, nears the improper. A nominee, as I have indicated before, usually can comment on judicial methodology, on prior caselaw, on hypothetical cases, on general issues like affirmative action or abortion. To make this more concrete, a nominee can do . . . well, what Robert Bork did. If Carter and recent nominees are right, Judge Bork's testimony violated many times a crucial norm of judicial conduct. In fact, it did no such thing; indeed it should serve as a model.

Return for a moment to those hearings, in which the Senate—and the American people—evaluated Robert Bork's fitness. Carter stresses the distortion, exaggeration, and vilification that occurred during the debate on the nomination. And surely these were present—most notably, as Carter notes, in the misdescription of Bork's opinion in *American Cyanimid*.[35] But the most striking aspect of the debate over the Bork nomination was not the depths to which it occasionally descended, but the heights that it repeatedly reached.[36] What Carter tongue-in-cheek calls "the famous national seminar on constitutional law" (p 6) was just that. The debate focused not on trivialities (Carter's "ethical molehills") but on essentials: the understanding of the Constitution that the nominee would carry with him to the Court. Senators addressed this complex subject with a degree of seriousness and care not usually present in legislative deliberation; the ratio of posturing and hyperbole to substantive discussion was much lower than that to which the American citizenry has become accustomed. And the debate captivated and involved that citizenry in a way that, given the often arcane nature of the subject matter, could not have been predicted. Constitutional law became, for that brief moment, not a project reserved for judges, but an enterprise to which the general public turned its attention and contributed.

Granted that not all subsequent confirmation hearings could, or even should, follow the pattern set by the Bork hearings, in either their supercharged intensity or their attention to substance. A necessary condition of both was the extreme conservatism of Bork's known views, which made him an object of terror to some

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[35] *Oil, Chemical & Atomic Workers Intl. Union v American Cyanimid Co.*, 741 F2d 444 (DC Cir 1984).

[36] For a similar view, see Strauss, Am Prospect at 94 (cited in note 19).

senators and veneration to others. It would be difficult to imagine hearings of the same kind following the nomination of Justice Ginsburg or Justice Breyer—two well-known moderates whose nominations had been proposed by senators on both sides of the aisle. To insist that these hearings take the identical form as the hearings on Judge Bork is not only to blink at political reality, but also to ignore the very real differences in the nature of the nominations.

But that said, the real "confirmation mess" is the gap that has opened between the Bork hearings and all others (not only for Justices Ginsburg and Breyer, but also, and perhaps especially, for Justices Kennedy, Souter, and Thomas). It is the degree to which the Senate has strayed from the Bork model. The Bork hearings presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction. Subsequent hearings have presented to the public a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis. Such hearings serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government. Neither can such hearings contribute toward an evaluation of the Court and a determination whether the nominee would make it a better or worse institution. A process so empty may seem ever so tidy—muted, polite, and restrained—but all that good order comes at great cost.

And what is worse even than the hearings themselves is a necessary condition of them: the evident belief of many senators that serious substantive inquiry of nominees is usually not only inessential, but illegitimate—that their insistent questioning of Judge Bork was justified, if at all, by his overt "radicalism" and that a similar insistence with respect to other nominees, not so obviously "outside the mainstream," would be improper. This belief is not so often or so clearly stated; but it underlies all that the Judiciary Committee now does with respect to Supreme Court nominations. It is one reason that senators accede to the evasive answers they now have received from five consecutive nominees. It is one reason that senators emphasize, even in posing questions, that they are asking the nominee only about philosophy and not at all about cases—in effect, inviting the nominee to spout legal theory, but to spurn any demonstration of

what that theory might mean in practice. It is one reason that senators often act as if their inquiry were a presumption—as if they, mere politicians, have no right to ask a real lawyer (let alone a real judge) about what the law should look like and how it should work. What has happened is that the Senate has absorbed criticisms like Carter's and, in so doing, has let slip the fundamental lesson of the Bork hearings: the essential rightness—the legitimacy and the desirability—of exploring a Supreme Court nominee's set of constitutional views and commitments.

The real confirmation mess, in short, is the absence of the mess that Carter describes. The problem is not that the Bork hearings have set a pattern for all others; the problem is that they have not. And the problem is not that senators engage in substantive discussion with Supreme Court nominees; the problem is that they do not. Senators effectively have accepted the limits on inquiry Carter proposes; the challenge now is to overthrow them.

In some sense, Carter is right that we will clean up the mess only when we change "our attitudes toward the Court as an institution"—when we change the way we "view the Court" (p 188). But as he misdescribes the mess, so too does Carter misapprehend the needed attitudinal adjustment. We should not persuade ourselves, as Carter urges, to view the Court as a "mundane and lawyerly" institution and to view the position of Justice as "simply a job" (pp 205-06). We must instead remind ourselves to view the Court as the profoundly important governmental institution that, for good or for ill, it has become and, correlatively, to view the position of Justice as both a seat of power and a public trust. It is from this realistic, rather than Carter's nostalgic, vision of the Court that sensible reform of the confirmation process one day will come. And such reform, far from blurring a nominee's judicial philosophy and views, will bring them into greater focus.